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REVIEW OF THE 10-PERCENT SET-ASIDE PROGRAM, SECTION 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

HEARING

BEFORE THE

SUBCOMMITTEE ON SBA AND SBIC AUTHORITY,
MINORITY ENTERPRISE AND GENERAL
SMALL BUSINESS PROBLEMS

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

WASHINGTON, DC, SEPTEMBER 19, 1984

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REVIEW OF THE 10-PERCENT SET-ASIDE PROGRAM, SECTION 105(f) OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

WEDNESDAY, SEPTEMBER 19, 1984

House of Representatives, Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems, Committee on Small Business,

Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2359-A, Rayburn House Office Building, Hon. Parren J. Mitchell (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN MITCHELL

Mr. Mitchell. Ladies and gentlemen, the hearing will come to order. As you will observe by the clock behind you on the wall, the House will go into session at 10 o'clock today. This presents something of a problem because there will be recorded votes and from time to time we will have to slow down the process in order to go over to the Capitol to vote. Each vote takes 15 minutes. Other members of the subcommittee will be joining us.

What I hope to do as the bells ring for a vote is to rotate which will allow some of us to cast our votes and come right back; in an effort not to interrupt the hearing as scheduled. On some of the more trivial votes I will simply not bother to go over, silly things like approving the journal from yesterday. I am not going to waste my time going over there for that.

First of all, I want to thank the staff of the subcommittee and the subcommittee members for their excellent cooperation in preparing for these hearings. This is but the first in a set of hearings that will be conducted. We expect to have more hearings next year in other States, citing how their performance is being implemented in this particular section of the Surface Transportation Assistance Act; and certainly we will be required to have a hearing, at which time witnesses other than State officials will give testimony. I have prepared a statement which I will not read because we have such a crowded agenda. I will submit it for the record, stressing what we are attempting to do in these hearings. That is to find out how well the set-aside provision of the Surface Transportation Act is being implemented by the Department of Transportation, and by various States.

I want to give a special thanks to all of the witnesses who will testify today. You submitted your testimony in a timely fashion and that is excellent, which means that many of us have had time to read your statements. Therefore, I would strongly urge and recommend to all who will testify that you not, and I reemphasize not, attempt to read your entire statement. Most of the members of the subcommittee have read your entire statement. I would urge and recommend very strongly that you be prepared to summarize your statement, giving from 5 to 10 salient most important features of your statement.

Great care was exercised in paginating the sequential presentation of the witnesses. Only I and my staff know the rationale behind the order in which the witnesses are to be heard. Therefore, there will be no deviation. I repeat, no deviation from the agenda as it is established. We have a list of witnesses. They are in order. We did it on a sequential pattern because there are certain things that we wanted to develop based on the statement of one witness, and then the next witness on down the line. So there will be no deviation on the order of the agenda, the order in which you are scheduled to appear.

Congressman Hayes and Congressman Savage will be joining us shortly, and when the time comes, I will turn over most of the questioning to them regarding the situation in Illinois because they spent a great deal of time and effort looking at the implementation of section 105(f) in this State. Congressman Wyden has a unanimous consent request. He has a statement that he wants to make, and I would ask unanimous consent that his statement be submitted for the record without objection.

Today, the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems will conduct a hearing to ascertain the impact of section 105(f) of the Surface Transportation Assistance Act of 1982 (Public Law 97-424) on the disadvantaged business enterprise [DBE] community.

I am dissatisfied with the criteria established by DOT that has been used by the States to determine who is eligible to participate in the program. When this legislation was enacted into law, it was the intent of the Congress that the primary beneficiaries of this program would be minority business enterprises. The term "disadvantaged business enterprise" is too broad and only serves to dilute the contracting opportunities of minority businesses.

The minimum 10-percent requirement of section 105(f) of this act is applied to all Federal funds that provide contracting opportunities in construction, procurement of supplies and materials, and professional and other services used in highway and transit projects.

Of the $70.1 billion authorized under this act, the Department of Transportation [DOT] has projected that it will fail to meet the statutory goal of 10 percent of that amount for the duration of the program.

According to a press release by DOT, minority-owned businesses were awarded nearly $720 million in federally funded highway contracts during fiscal year 1983. Secretary Dole announced on January 31, 1984, that this record level of awards represents a 209-percent increase in minority contracts during the last 3 years. Secretary Dole also noted that many of the contracts awarded in 1983 contained provisions for additional subcontracts for minorities to be awarded in future years, thereby bringing the total dollar volume of minority contracting opportunities to nearly $800 million, which represents 9.83 percent of the nearly $8 billion in total highway contracts let during the year. According to the Secretary, this percentage exceeds the nationally established goal of 8.84 percent by nearly a full percentage point.

Although the program has provided contracting opportunities for disadvantaged business enterprises, there are still problem areas confronting DBE's that impede the growth and development of new and existing firms in the construction industry. The problem areas identified include: (1) barriers such as bonding, prequalification and licensing; (2) the availability of technical, financial, and other supportive assistance for new and existing firms; (3) efforts being made by each recipient to inform disadvantaged businesses about specific contracting opportunities; and (4) enforcement mechanisms used by each State to ensure the participation and utilization of DBE's. This committee is also concerned about the recordkeeping system used by the States and DOT from which the goal level achievements, both nationally and by individual States, are obtained.

This hearing will focus, in part, on these identified problem areas to determine what efforts have been made to correct them. We will also focus on the States' certification process and the utilization of DBE's as prime's and subcontractors.

We have invited as witnesses the Governors of the States of New York, Maryland, South Carolina, Virginia, Illinois, and California; the Mayor of the District of Columbia; and the Secretary of the Department of Transportation.

On behalf of the committee I want to take this opportunity to thank each witness for taking time out of his/her busy schedule to be with us today. I am sure your testimony will provide us with the kind of information needed to determine the impact of the Surface Transportation Assistance Act on the DBE community to date.

Finally, we will operate under a strict 5-minute rule because of the very crowded agenda, a very strict 5-minute rule for the members of the committee. We will proceed in the fashion that is followed by most of the House committees. We will recognize two Democrats to raise questions and then one Republican; we will ask that the members limit their questioning period to not more than 5 minutes. I know that means we will probably only be able to get in one or two questions. I will ask the staff to make sure that the 5-minute rule is exercised during this hearing. That means the staff will notify you and the members of the subcommittee when your 5 minutes are up.

I am delighted that Congressman Addabbo is here with us, delighted by his reelection. I am also delighted that Congressman Hayes is here. As I indicated earlier, when we come to the State of Illinois, I will give up my time for questioning to Congressman Hayes and Congressman Savage because of the amount of time that they have spent working on this problem. Also, Congressman Stenholm, I am glad that you could take time from your very busy schedule to be with us. We are scheduled to adjourn on October 4, and the closer we get to the adjournment date the greater the volume of work we have to contend with. Again let me thank you for joining us.

Our first witnesses this morning are from the U.S. Department of Transportation; Armando Mena, Director, Office of Small Disadvantaged Business Utilization; Ray Barnhart, Administrator, Federal Highway Administration, and Ralph Stanley, Administrator, Urban Mass Transit Administration.

Mr. **ADDABBO**. Would the gentleman yield?

Mr. **MITCHELL**. Yes, I would be delighted.

Mr. **ADDABBO**. I appreciate the gentleman for yielding. As you know, we are still moving on our defense appropriation bill and hopefully we will complete markup and move the bill through the House so we will have an appropriation bill. Hopefully we will reduce it enough so that the Department of Transportation will get some more money so that they can get more contracts out to minorities.

I have certain questions. There will be witnesses from the New York Department of Transportation, and I would like those questions placed in the record in my name for them to answer them. I believe that this hearing is most important. We pass legislation, and when we get down to the operation it seems there is stalling as I've seen in New York of certification of small business minorities. Small business is taking sometimes 9 months where normally it should be processed in 30 days. So these hearings are very important to let the agencies know, and the various States know, that when we pass legislation we mean it, and it is not there just for publication.

The committee mentioned that they will monitor the program respect the entire Nation, especially our individual States, and we expect that if States expect to continue to get Federal funds, that they must comply with the law as written. These hearings will press that point and hopefully impress them that they know when we come back next year, if they haven't met their record, there will be some questions as far as the appropriations process is concerned.

Mr. **MITCHELL**. Thank you very much, and those questions will be submitted for the record. If any members have opening statements that they wish to make, I would ask unanimous consent that they be submitted for the record as of this time.

I am also delighted that Congressman McDade, the ranking minority member of this subcommittee, could be with us. He is also a member of the Appropriations Committee, so I don't know how long he can stay, but we are very glad you could be with us today.

Mr. **McDADE**. Thank you. I am happy to be here, and I have a great interest in the program.

Mr. **HAYES**. Mr. Chairman, I, too, am pleased that you have convened this hearing on the status of the Surface Transportation Assistance Act of 1982, an effort to evaluate the impact on the disadvantaged business community. It is my hope that this hearing will provide for this committee valuable insight on the structural and procedural barriers that have prevented disadvantaged businesses from fully participating in contracting opportunities: In construction, procurement of supplies, and professional and other services used in highway transportation projects.

I personally have received numerous complaints of the restrictive prequalification requirements which limit minority participation in the program, and of wide-spread abuse from the minority front companies in the city of Chicago. So I am watching with interest and intend to participate fully in the full length of this hearing.

Mr. MITCHELL. Thank you very much. Congressman Stenholm, do you have a statement?

Mr. STENHOLM. No.

Mr. MITCHELL. Thank you.

Gentlemen, I ask that none of you attempt to read your entire prepared statement, but that you simply summarize the most salient and important facts.

Mr. Mena.

TESTIMONY OF ARMANDO L. MENA, DIRECTOR, OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY RAY A. BARNHART, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION; AND RALPH L. STANLEY, ADMINISTRATOR, URBAN MASS TRANSIT ADMINISTRATION

Mr. MENA. Good morning, Mr. Chairman and members. It is a pleasure for me to appear before the committee to provide an overview of the Department of Transportation's implementation of section 105(f) of the Surface Transportation Act.

The Secretary sends her regrets for not being here personally, but due to a number of pending out-of-town requests, she asked the staff if it would be permissible for her to send representatives to this hearing as she did.

I am accompanied by the Administrators of the Urban Mass Transit Administration and the Federal Highway Administration, Ralph Stanley, and Ray Barnhart, who will provide more specific information regarding their agency's implementation of section 105(f).

As you know, the Surface Transportation Act was passed in December 1982, and signed into law on January 6, 1983, by President Reagan. While the act did not become law until well into fiscal year 1983, disadvantaged businesses and enterprises in fiscal year 1983 received more than $1 billion in contract awards from our highway and mass transit grant recipients. This includes $799 million in highway prime contract awards and subcontract commitments, and $298 million in transit contracts. For FHWA's 52 program recipients, this represented a nationwide average of 9.8 percent DBE participation in all Federal-aid highway contracts. For UMTA's 451 program recipients, this represented a nationwide average of 14.3 percent DBE participation in all federally assisted contracts.

We are also proud of the results of our initiatives encouraging DBE's to participate in the program and our efforts to address our concern affecting implementation of the DBE program. Through our Office of Small and Disadvantaged Business Utilization (OSDBU), we have implemented a number of programs which assist DBE's interested in performing work on transportation-related projects. In our 12 program management centers, which are located across the country, information on procurement opportunities from our grant recipients is made available to DBE's. We provide DBE's with the management and technical assistance necessary to engage in competitive bidding and perform transportation-related projects.

OSDBU has sponsored five workshops on surety bonding which are designed to provide DBE's with an understanding of the surety bonding process and the underwriting criteria generally employed by most surety companies. OSDBU also sponsored five seminars on the act in order to disseminate information on the DBE program. We have also participated in numerous conferences to inform recipients and DBE's about OSDBU programs and the act.

The Department believes that combating abuse of the DBE program is a key to ensuring its success. Nothing can destroy the integrity of such a program faster or more effectively than its infiltration by significant numbers of fronts, firms that are not eligible DBE's but claim to be so in order to take advantage of the program. The Department is carrying out its commitment to the integrity of the DBE program in several ways: One, we have a first line defense against abuse for recipients to have strong certification and verification programs. The DOT Office of Civil Rights also considers complaints alleging that firms already certified by the recipients are ineligible. When the Office of Civil Rights finds that a firm is ineligible, it directs the recipient to decertify it. Likewise, when the office finds a recipient has improperly refused to certify the eligibility of a firm, it prepares the corrective action.

The Department has recently published a new departmentwide suspension and debarment regulation. This gives the Department the authority to take administrative action to prohibit participation in any DOT-assisted contract for a period of up to 6 months and 3 years of a firm that has been found guilty of a criminal offense or has engaged in conduct demonstrating a serious lack of business integrity. This rule encompasses, in appropriate situations, both front firms themselves and their sponsors; for instance, a prime contractor that sets up a front to get around DBE goal requirements.

The Department, through its Office of Inspector General, may refer cases of suspected criminal conduct to U.S. attorneys for possible prosecution under the Federal false statements or mail fraud statutes. While the Inspector General has made a number of such referrals, the effectiveness of this remedy has been limited by evidentiary problems and the fact that U.S. attorneys have often not assigned such cases a high priority because the demonstrable damages sustained by the Government in individual cases are often small relative to other cases.

Also, the Department is working on revisions of the DBE programs' regulations to strengthen and clarify the eligibility criteria, revise schedule A, the model certification information form, to request more specific information that will make it more difficult for ineligible firms to apply for certification.

I would like to submit my complete statement for the record, and at this time, with your permission, would like to present all of our statements and answer questions at the completion of the joint testimony of the Administrators. I would like to now ask the Urban

Mass Transit Administrator, Ralph Stanley, to provide you with additional testimony.

Mr. MITCHELL. This arrangement will be fine.

[Mr. Mena, Mr. Stanley, and Mr. Barnhart's prepared statements follow:]

PREPARED STATEMENT OF RALPH L. STANLEY, ADMINISTRATOR, URBAN MASS TRANSPORTATION ADMINISTRATION

Good morning, Mr. Chairman and Members of the Committee. I am pleased to discuss with you the Urban Mass Transportation Administration's (UMTA) implementation of section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA). As you know, that Act was a landmark piece of legislation for UMTA. It directed one cent of the gas tax increase to our urban discretionary program and established a new block grant program for urbanized areas. No less significant was the commitment to Disadvantaged Business Enterprises (DBEs) set forth in section 105(f), a provision that was included through the efforts of Chairman Mitchell.

UMTA as an organization shares -- and I personally share -- the Secretary of Transportation's serious commitment to full and effective implementation of section 105(f). Central to that commitment is the Department of Transportation's regulation implementing the DBE program. The regulation requires each recipient that receives funding assistance above established thresholds to submit goals for DBEs and Women's Business Enterprises (WBEs) as a condition of receiving Federal assistance. These goals must be approved by UMTA before we award a grant. These goals cover all contracting opportunities except those for purchase of transit vehicles. In the latter case transit vehicle manufacturers themselves must submit goals for UMTA approval in order to be able to bid on an UMTA-assisted contract.

After the Department issued the regulation in July 1983, UMTA formed a section 105(f) Task Force to ensure uniform implementation of the regulation and provide specific program guidance to recipients and UMTA staff. The Task Force -- which consisted of representatives of UMTA program offices, as well as our Office of Civil Rights -- was instrumental in quickly resolving administrative and programmatic difficulties associated with implementing the regulation. The Task Force developed a wide range of materials: internal compliance and monitoring checklists and review formats; questions and answers concerning the regulation used by UMTA personnel, recipients, and DBE/WBEs; initial drafts of an internal order and an external circular; and materials for a workshop to train UMTA regional staff advising transit agencies about procedures for implementing the regulation. This information proved invaluable in launching UMTA's section 105(f) program.

We believe those early efforts proved worthwhile. During FY 1983, UMTA identified 451 recipients that met the dollar threshold figures specified in the regulation. Even though FY 1983 was a transition year for the section 105(f) program, awards to DBEs totalled $298 million or 14.3 percent of the total contracting funds expended ($2.1 billion). In addition, $47.4 million or 2.3 percent were awarded to WBEs.

In the first half of this fiscal year reported contracting expenditures of UMTA recipients totaled $1.1 billion. Of that total, $143 million or 12.7 percent were awarded to DBEs. An additional $34.2 million or 3 percent were awarded to WBEs. In FY 1984, we fully expect to exceed the level of DBE and WBE participation for FY 1983.

Program Guidance

UMTA has made substantial efforts to provide program guidance to UMTA field staff, recipients of UMTA assistance, transit vehicle manufacturers, and DBE/WBEs. In addition, we have worked closely with States and localities to help them fulfill the intent of the law. For example, UMTA sponsored -- in conjunction with the American Public Transit Association (APTA) and the American Association of State Highway and Transportation Officials -- five Regional DBE/WBE Conferences. The conferences, which were national in scope, provided information and technical assistance to our recipients, transit vehicle manufacturers, and DBE/WBEs. The conferences were conducted in Atlanta, Georgia; Philadelphia, Pennsylvania; Arlington, Texas; San Francisco, California; and Chicago, Illinois. Recipients and DBE/WBEs from the specified regional areas were invited to participate in the conferences, as were transit vehicle manufacturers. I was pleased to have the opportunity to participate personally by addressing the conference in Arlington, Texas. Each of the conferences provided an opportunity for recipients, transit vehicle manufacturers, and DBE/WBEs to become better informed about the section 105(f) requirements, and, we trust, better able to provide opportunities for DBE's and WBEs.

In a further effort to provide guidance to UMTA personnel and recipients of UMTA financial assistance, the Office of Civil Rights called together representatives of transit agencies and UMTA headquarters and field offices to review, revise, and develop a circular to implement our DBE/WBE program. This circular is in the final review process and will be issued next month.

In addition, during the current fiscal year, UMTA has sought to identify barriers to successfully carrying out our section 105(f) program. One of those identified by transit authorities and DBE/WBEs concerns certification. As a result, we intend to schedule early in FY 1985 a meeting of representatives of transit agencies, State departments of transportation, and DOT personnel to develop an effective and acceptable certification process. A concept that we will bring to the meeting is establishing a regional certification process that would be effective and yet remove the burden that DBE/WBEs experience in obtaining individual certifications from each transit operator.

In addition to the specific measures I've just outlined, UMTA will issue advisory memoranda concerning other problem areas as they are identified.

Compliance

UMTA has continued to emphasize compliance with the requirements of the DBE program. During FY 1984, we have conducted joint on-site compliance reviews with the Federal Highway Administration to ascertain compliance of our grantees with the regulation. Our regional civil rights personnel have also conducted on-site reviews of selected grantees. In scheduling our compliance reviews, we first review agencies about which a DBE/WBE transit-related complaint is filed with DOT and forwarded to UMTA for investigation.

Technical Assistance

Other major efforts by UMTA to increase the participation of DBE/WBEs involve technical assistance. This year UMTA is providing considerable technical assistance through our Demonstration Bonding Program. This program is designed to help alleviate problems DBE/WBEs face in obtaining surety bonding so that they can participate more fully in certain UMTA-funded construction projects. I might add that this is a joint public/private initiative. UMTA section 20 funds totalling $3 million have been committed to be combined with $3 million in private funds and leveraged to provide $60 million in total bonding capacity for DBE/WBE construction contractors. Since this is a demonstration program, these funds will be available initially only for transit construction projects in the four demonstration cities: Los Angeles, Houston, Detroit, and New York City.

In conjunction with each of the three-day Regional DBE/WBE Conferences that I mentioned earlier, UMTA conducted a one-day procurement fair for small and disadvantaged businesses. At the fairs, contract and procurement officers from UMTA recipients provided information and guidance about contract and procurement opportunities to interested minority and women owned firms. Through our procurement fairs we expect to increase the level of DBE/WBE participation. A number of important contracts have already been awarded to DBE/WBEs as a direct result of their participation in the fairs.

Building on the success of these procurement fairs, UMTA will conduct 15 additional fairs around the country through the Procurement Support Delivery System (PSDS) established by our Office of Civil Rights. The PSDS is designed to increase DBE/WBE participation in UMTA-funded procurement opportunities. It entails placing in select localities a number of procurement representatives who will be responsible for identifying contract opportunities for DBE/WBEs, as well as identifying qualified DBE/WBEs who could participate in local transit projects. A PSDS newsletter will be published monthly, highlighting specific procurement opportunities and providing timely section 105(f) program information.

In addition, UMTA has contracted for the preparation and distribution of a series of "DBE Briefs," which impart program, technical and management information and advice; information on other related Federal programs; and any other information which would be of interest or value to DBEs. A series of five "DBE Briefs" will be distributed to cities, transit operators, and planning organizations who routinely work with DBEs.

Section 20 Program Accomplishments

Section 105(f) has encouraged transit operators to expand their procurement opportunities among DBE/WBEs. To further such efforts, UMTA has encouraged operators to seek funds under UMTA's Human Resources technical assistance activity. The operators can use these section 20 funds to provide technical and managerial assistance to local DBEs and WBEs. We expect that this technical and managerial assistance will enhance the viability and improve the performance of participating DBE/WBEs. It is hoped that the benefits of section 105(f) will in this way endure in the form of well-established, well-managed enterprises, fully capable of successfully competing in the American economic mainstream.

This fiscal year I have authorized the approval of grants and cooperative agreements in support of the Department's DBE objectives exceeding $4 million. This is an appreciable increase over FY 1983 funding.

I believe that providing training and job opportunities is central to achieving the aims of section 105(f), and this is the principal objective of our section 20 program. At my direction, UMTA helped develop and fund a vehicular maintenance training program in cooperation with the Opportunities Industrialization Centers. This program will provide training and job opportunities for minority youth as well as assist the transit industry by upgrading the skills of maintenance professionals.

I have also signed a cooperative agreement with the National Council of Negro Women to initiate a demonstration program to expand supervisory and management opportunities for women in the transit industry.

UMTA is working with many organizations in developing strategies to increase minority business participation in joint development activities. A recent example is an award to the Golden State Business League which will examine joint development opportunities for minorities in and around transit stations. Another project funded through the United Contractors of Kansas and Nebraska involves the location and placement of eligible minority and women contractors on transit related projects.

I would like to add that many of our efforts have grown out of discussions with minority business entrepreneurs and organizations in which we sought to find practical solutions to the problems facing these businesses.

Other UMTA Efforts

UMTA, in addition, has entered into a cooperative agreement with the Florida State Conference of NAACP branches to identify barriers to DBE participation in selected recipients' programs in Florida, to provide technical assistance to increase DBE participation in UMTA-funded projects, and to identify and match qualified DBEs with available contract opportunities so that recipients can meet their DBE goals.

We hope that this agreement will foster a cooperative approach toward disadvantaged business utilization between recipients and DBEs in attaining the 10 percent goal in the STAA. If effective, this agreement could provide an excellent model for similar cooperative approaches nationally.

UMTA has also initiated efforts to automate program and contract award data received from recipients on DBE and WBE activities. This will help us to monitor more quickly and efficiently the implementation and effectiveness of DBE/WBE programs.

Recipients' Efforts

Transit operators who are UMTA recipients utilize a wide range of techniques to disseminate contract opportunity information to disadvantaged business enterprises. These techniques include the following:

1. Advertising bid notices and solicitations in local media, particularly those serving the minority community;

2. Identifying from DBE directories the names of firms that may be interested in participating on specific contracts, and contacting such firms directly, by telephone or letter;

3. Procurement and/or DBE offices' regularly issuing notices or bulletins relating to present or future procurements/contracting opportunities:

4. At pre-bid conferences, potential bidders' being informed that prime contracts contain DBE goals and that bidders have the responsibility of meeting these goals by soliciting DBE participation;

5. Contacting DOT-sponsored Program Management Centers that disseminate contract opportunity information to interested DBE's;

6. Sponsoring or attending seminars/conferences at which information on recipients' present or future contracts or procurements is disseminated; and

7. Publishing newsletters that describe upcoming projects and procurements/contracts anticipated for these projects.

Large transit operators tend to use most or all of these techniques. The primary techniques used by the smaller operators are media advertising and direct telephone contacts.

Conclusion

In sum, UMTA is continuing to implement this significant provision of the STAA through innovative as well as traditional initiatives. We believe that the total dollar level of DBEs funded in FY 1984 will be significant, and we trust that with our ongoing outreach programs and technical assistance even higher levels will be reached in future years.

The Committee has expressed interest in knowing the funding provided by UMTA to certain States in FY 1983 and FY 1984 as well as the total contracting dollars available to provide contracting opportunities for DBEs in FY 1983 and FY 1984 in those States. I would be pleased to submit that information for the record.

Thank you for providing me this opportunity to appear today. Administrator Barnhart will now speak about the Federal Highway Administration's program.

PREPARED STATEMENT OF RAY A. BARNHART, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION

Good morning Mr. Chairman and Members of the Committee. I am pleased to have the opportunity to discuss the Federal Highway Administration's (FHWA) implementation of § 105(f) of the Surface Transportation Assistance Act of 1982 (STAA). Section 105(f) requires, except to the extent the Secretary determines otherwise, that not less than 10 percent of the funds authorized to be appropriated by the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

The Department has taken seriously this directive from the Congress. The final regulation published in July of 1983 is, I believe, a reasonable and responsible procedure for implementing that mandate.

I would like to point out, however, that FHWA's efforts to increase minority-owned business participation in the highway program pre-date § 105(f), going back to the early 1970's, and that by 1977 nationwide goals for minority business participation had been established.

In 1980, a departmentwide regulation was issued which required recipients of financial assistance from the Department to go beyond MBE goal setting and to establish action programs which would promote development of minority business enterprises (MBE). This MBE regulation resulted in significant increases of minority business participation in the Federal-aid highway program. Contract awards to MBEs increased from $232.7 million in 1980, to $355.2 million in 1981 and $415.5 million in 1982.

Because of these significant results, it seemed appropriate to expand on the existing MBE regulation in developing the regulatory mechanism to implement § 105(f). As a result, several provisions of the 1980 regulation were incorporated in the new DBE regulation that was published last year. However, § 105(f) made three significant changes to the situation in 1980. First, it provided additional statutory authority to the program; second, it set a specific level of participation which the Department was expected to obtain (10 percent); and finally, it altered the previous MBE program by requiring the use of the definitions appearing in § 8(d) of the Small Business Act (15 U.S.C. § 637(d)) with regard to the programs authorized in the Act.

In February 1983, FHWA adjusted the states' Disadvantaged Business Enterprises (DBE) goals to reflect the new statutory 10 percent goal. We also began a series of periodic instructions to our field offices and the states to help the transition from the MBE to the DBE program.

The accomplishments in the DBE program for FY 1983 are noteworthy, particularly given the challenge provided by that transition year. With the tremendous increase in the highway program level and the significant increase in DBE participation required by § 105(f), DBE participation in the highway program reached a new record of $799 million in contract and subcontract commitments, or 9.8 percent of all Federal-aid highway contracts.

The accomplishments for FY 1984 continue the pattern of FY 1983. Forty-four states, Puerto Rico, and the District of Columbia established goals of 10 percent or greater. Only 6 states requested goals of less than 10 percent, ranging from 3.3 to 8.0 percent.

As a result of these goals and the aggressive efforts of the states to implement the DBE program, FY 1984 should be another record year for DBE participation in the highway program. Preliminary statistics for the first 6 months of FY 1984 indicate that $528 million, or 13.7 percent, of Federal-aid highway contracts have been committed to DBEs. This significantly exceeds the 10 percent statutory goal established by § 105(f).

We are now receiving goal requests from the states for FY 1985. The vast majority of states have requested goals of 10 percent or greater, and several states have increased their goals over FY 1984 levels.

FHWA AND STATE EFFORTS TO IMPROVE THE DBE PROGRAM

The FHWA and the states have made major efforts to make the DBE program successful.

During a period when personnel levels have been generally declining, many states have established new positions to coordinate this program. At the Federal level, the FHWA has made a major commitment of resources at its Headquarters, as well as in our regional and division offices.

In addition, many states have taken actions to remove barriers to DBE participation, including such steps as eliminating bonding requirements for subcontractors and for small prime contractors, and modifying or eliminating prequalification requirements.

INNOVATIVE PROCEDURES BY THE STATES

The states have also been very successful in developing innovative procedures and techniques designed to enhance the program. The FHWA has issued memoranda describing these innovative procedures in an effort to encourage continued discussion and assist in the exchange of new ideas and information among the states. For example:

One state has adopted a contract provision which allows for payment of mobilization costs to DBE subcontractors. This allows disadvantaged businesses with limited capital a greater opportunity to compete with other subcontractors.

Another state has provided an incentive for local agencies to use DBEs for preliminary engineering by providing additional allocations of Federal-aid funds to these agencies, equal to the amount expended with DBEs.

Another state has assigned highway inspectors to each of its districts, on a full time basis, to assist DBEs in areas such as plan reading and interpretation of specifications.

Still another example of innovation can be found in a state where development credit funds, established through agreements with local banking institutions, permit DBEs to apply for low-interest loans for use in establishing working capital or purchasing equipment. The state guarantees 80 percent of each loan.

SUPPORTIVE SERVICES

The Federal-Aid Highway Act of 1970 authorized the expenditure of up to $5 million per year for skills-training supportive services programs. In 1973, Congress increased the limit to $10 million per year. Beginning in 1976, FHWA allocated a portion of these funds (§ 140(b)) for both skills-training and efforts to increase minority business participation in Federal-aid highway contracts. Through FY 1983, approximately $30 million of these funds were used to assist MBEs.

The 1982 STAA established a separate funding category for MBE supportive services under § 140(c) and authorized the use of up to $10 million a year for this purpose. This maximum allowable amount was used for MBE supportive services in FY 1984 and we have budgeted the same amounts for FY 1985 and FY 1986. Also in the STAA, the skills-training supportive services program was retained at a level of $5 million per year.

These funds have been used by the states to develop individual programs to contribute to the growth and eventual self-sufficiency of these firms. Some of the more common activities provide one-on-one assistance in plan reading, preparation of bids or quotes, obtaining bonding or loans, limited classroom training in these same areas and in certain management skills. The states are also involved in notifying DBEs of contracting opportunities, improving communications between bidders and potential DBE subcontractors, and assisting DBEs to become certified.

PROGRAM GUIDANCE

Much of the basic criteria for administration of the DBE program are contained in the DOT 1980 MBE regulation; however, with the implementation of § 105(f), the program has grown not only in size, but also in complexity.

To counter this problem, the FHWA has devoted substantial efforts to provide guidance to our field offices, the states, the contracting community and others to ensure the continued effectiveness of the program. We have issued sets of questions and answers which address different questions and problems in such areas as general program administration, the determination of goals and good faith efforts, the determination of the amount of credit toward DBE goals in some unusual arrangements, and procedures for certification and decertification.

Furthermore, we have issued a number of memoranda on these subjects, including detailed guidelines on certification and verification of DBEs, guidelines on the type of assistance a prime contractor may provide to developing DBEs, and information on available bonding and loan assistance programs.

In every instance, our objective has been to develop guidance which will preserve the integrity of the program and prevent abuse, while still providing enough flexibility for each state to tailor a successful program to meet its needs.

DBE CONFERENCES

The FHWA has jointly sponsored with AASHTO a series of seven conferences to discuss and exchange information on problems and successes in implementing the DBE program. These conferences have been conducted in two parts. The first part primarily involves FHWA and state personnel, and deals with the legal and administrative aspects of the program. The second part is directed toward the contracting community, both DBE and non-DBE, and provides them an opportunity to ask questions of Federal and state personnel, and to develop better understanding of the program.

Five conferences have been held thus far: Atlanta, San Francisco, Denver, San Antonio, and Indianapolis. Two more conferences are scheduled; one in Boston on September 24-26, and another in Philadelphia on October 9-11.

The conferences have had excellent participation by top management and operational personnel from both the states and FHWA. We believe they have been very successful in resolving questions about the program and promoting improvements in individual state programs.

FIELD REVIEWS

The integrity and success of the DBE program depends on the development and implementation of effective procedures by the states. At the Federal level, primary responsibility for ensuring that these procedures are developed and carried out rests with the FHWA field offices. These responsibilities are carried out through a combination of program reviews and project inspections. However, in view of the importance of the DBE program and its complexity, we have also initiated management reviews by Headquarters personnel.

In addition to detailed reviews that have been conducted in several states by our Office of Civil Rights, Headquarters personnel conducted reviews in nine states. The states were selected on the basis of their accomplishments in the first quarter of FY 1984. Four states which were behind their goals were reviewed to determine if program improvements were needed. Five states which were well ahead of their goals were reviewed to assure that their data was not inflated due to improper reporting. Each review lasted one or two days and was used to ensure that DBE subcontracting commitments by prime contractors were being met. The reviews showed that commitments were being met.

We will continue to make reviews in selected states as the need arises. In addition, contract compliance reviews will be made in all states.

IMPROVED MANAGEMENT INFORMATION SYSTEM FOR COLLECTING DBE PARTICIPATION DATA

In FY 1985, we will implement a new procedure for monitoring DBE and Women Business Enterprise (WBE) contract awards and subcontracting commitments which are used to measure compliance with overall annual state goals. The procedure has been used on a trial basis since August and will be fully implemented beginning in October of 1984. This procedure is fully compatible with a uniform reporting procedure being developed by DOT for all modal administrations.

Although FHWA has had procedures for reporting MBE contract award data for a number of years, these procedures were not fully suitable for measuring compliance with § 105(f). Interim procedures were adopted in June 1983 which allow determination of the DBE accomplishments in each state on an annual percentage basis . The measurement is based on the Federal share of prime contracts awarded to DBEs plus DBE subcontracting commitments on all other prime contracts.

The existing reporting procedure was also continued since there was still a need for actual subcontract award data. We recognize, however, that the existence of the two separate reporting procedures has caused problems and misunderstandings.

The new procedure has been designed to resolve these problems and we believe it will result in more effective management of both the DBE and WBE programs. The type of data reported will be essentially the same as in the past with three significant changes: (1) only quarterly totals will be reported with project-specific data being retained at the state level; (2) DBE and WBE contract commitment data will be required; and, (3) only the Federal share of actual subcontract awards will be reported, the same as for prime contract awards and contract commitments. A contract commitment relates to the DBEs and WBEs named, along with the dollar value of their participation as subcontractors by the successful bidder in the contract documents.

PROBLEMS AND FUTURE EMPHASIS AREAS

While we are proud of our accomplishments and the tremendous progress being made, the program is big ($1 billion in DBE participation per year) and complex. This coupled with the rapid growth of the program has resulted in a number of serious problems which we are actively working to resolve. The DBE program will continue to be a program emphasis area for FY 1985 and we have targeted the following problems for special attention.

CERTIFICATION AND VALIDATION

Since the program went into effect much emphasis has been placed on outreach efforts to increase the number of participating DBEs. The states have done an outstanding job, but in many instances increased certification activity has made it necessary for the states to defer in-depth verification of the information submitted by applicants.

There are currently more than 10,000 DBEs and WBEs. The number of applications which have been denied is not available, but based on very limited information, is estimated to be several thousand. Since the DOT regulations require annual resubmissions of certifications, this obviously represents an enormous workload. It is estimated that about 800 firms have been decertified already in FY 1984 by the states. This figure does not include the number of certification requests or resubmissions which were rejected outright. To further illustrate this point, in about 9 states the number of firms now certified is lower than the number certified when the STAA was passed.

We acknowledge that much remains to be done to maintain the integrity of the program. We recently issued a memorandum to all our field offices stating that it is imperative that the states make every effort to verify that DBE/WBE certification data is correct. Preferably this should be done as part of the certification process, as a number of states are presently doing, but at this time, we have established as first priority in depth reviews of DBEs and WBEs with large dollar volumes of work.

MONITORING DBE PARTICIPATION TO DETERMINE THAT IT IS CONSISTENT WITH STANDARD INDUSTRY PRACTICE AND SERVES A COMMERCIALLY USEFUL FUNCTION

In addition to the need for strong certification and validation procedures, there is a need for close monitoring of the DBE program to assure that the DBEs are performing roles consistent with standard industry practices and serving a commercially useful function, not simply the role of a broker or passive conduit.

To monitor this area of potential abuse, the states must first determine whether a firm has a necessary and useful role in the transaction or whether the firm's role is a superfluous step added in an attempt to obtain credit toward goals. The situation where the name of a DBE/WBE firm is used for a fee in exchange for the work to be done by the prime contractor will not be tolerated. Beyond this we have been faced with many questions in cases where the DBE/WBE firms may be performing a commercially useful function but it is not consistent with standard industry practice; for example, trucking firms leasing 80 percent of the trucks and drivers needed to perform a subcontract, and firms facilitating the delivery of supplies rather than performing the function of a supplier. Under the DOT regulations, a recipient or contractor may count toward its goals its entire expenditure to DBE/WBE subcontractors and manufacturers. Credit for purchases of materials or supplies to nonmanufacturers is limited to 20 percent of the purchase price of the item. Consequently, the question has been what, if any, is the proper credit to be awarded in such cases.

The Department is currently considering a revision to the regulations on this issue to deal with the complexities of the marketplace and to prevent abuses. In the meantime we have authorized counting only the fee retained by a DBE firm which is performing a commercially useful function but not as a construction contractor or supplier under normal industry practices. Guidance based upon actual cases is routinely disseminated to our field offices and they have been requested to monitor these situations closely.

STUDY OF THE DBE PROGRAM IMPACTS

We are currently planning an in-depth study of the DBE program and its impacts. The study will be designed to determine the effect of the program on the number of DBE firms participating in the highway program, any changes in the types and complexity of work they perform, as well as effects of the program on minority employment. The study will also look at some associated problems including "fronts" and the use of the DBE program to achieve objectives not consistent with the intent of the Federal-aid contracting program, such as limiting competition to local firms.

The study will also look at other impacts of the DBE program on the highway construction industry, particularly the effects of the apparent concentration of DBE firms in certain specialty contracting areas. The FHWA has received many comments that the DBE program has adversely affected the existing non-minority specialty highway contractors - contractors in such areas as landscaping and traffic safety - because prime contractors must use DBE specialty contractors to meet the goals. To meet our objective of a strong, self-sufficient DBE contracting community, we will continue to emphasize the need for DBE participation across the full spectrum of contracting opportunities in the highway program, not just in the specialty area.

IMPACT ON DBE PROGRAM ON WBE PARTICIPATION

The aggressive efforts of the states to implement the 10 percent requirement of the DBE program has adversely impacted on the growth we would have normally expected in WBE participation. Since the WBE program does not have a statutory goal requirement, the level of effort to increase WBE participation simply has not kept pace with DBE achievements. In establishing goals for FY 1985 we instructed our field offices to stress the need for higher WBE goals. Of the FY 1985 goal requests we have seen thus far, a modest increase is all that can be expected. We believe this is due to the fact that the WBE program is competing with the high goals for DBE participation and there is limit to subcontracting possibilities in any given contract.

However, it is not accurate to say that WBE participation is represented solely in WBE goals. Due again to the higher DBE goals, the use of women owned minority firms is often counted toward the DBE goal or is split counted toward both goals.

THE CAPACITY OF THE DBE CONTRACTING COMMUNITY IN SOME AREAS TO MEET THE DBE GOALS

We have received many complaints that a sufficient number of DBEs are simply not available to competitively meet the DBE goal requirement. As a result contract goals may become harder to reach. This situation is becoming particularly acute in areas with low minority populations or where the minority community is concentrated in particular areas of a state. A number of states have advised us they are receiving requests to either lower contract goals or award more contracts on the basis of good faith efforts by contractors who cannot achieve such goals. In these areas, the states and contractors maintain that the available DBE contracting community is already working or will be shortly to full capacity so that they will be unable to competitively bid on additional work.

In areas where there are no available DBEs, it is becoming harder to obtain DBEs from another geographical area due to current work loads, mobilization costs and other risks. While the states are taking aggressive actions to locate and develop additional firms, they find the complexities of highway contracting make overnight development of these firms impossible.

CLARIFYING MISINFORMATION AMONG THE DBE AND MAJORITY CONTRACTING COMMUNITIES

As stated earlier, this program is complex, particularly in the area of goal setting and achievement, certification, counting participation and reporting. The complexity is compounded when one considers that it must mesh within existing Federal-aid funding procedures and highway construction industry practices.

As a result we spend a considerable amount of time clarifying misinformation and misunderstanding concerning the program. Lawsuits have been needlessly filed by both the DBE and majority contracting communities based upon misperceptions of fundamental program elements. For example, a number of people believe the 10 percent requirement of § 105(f) earmarks 10 percent of the funds used on every contract for DBE use. They equate this to "lost DBE funds" on any contract not obtaining 10 percent DBE participation. This is not true. Each state sets an annual goal to comply with the Federal requirements and individual contract goals to meet the annual goal. If a state does not meet its goal in a particular contract, it simply means the state will have to strive harder to meet its annual goal in other contracts to be let within that fiscal year. There is no such thing as "DBE funds" apportioned or allocated to a particular contract. In this respect, a number of contractors still believe the 10 percent goal is a quota or set aside. It is not.

A number of people also believe that all decertified firms should be debarred or criminally prosecuted if they ever obtained a contract before they were decertified. This ignores the way contracts are counted toward DBE goals and whether the criminal elements of fraud were present. A purported DBE may be decertified because it was never truly qualified, or because it later lost qualification, perhaps through shifts in ownership shares. In the first case, the contract would not be counted towards DBE goals. In the second, the contract could count towards the goals, if the disqualifying event occurred after the contract was completed. The question of prosecution or debarment is entirely separate, and will depend on the presence of the elements of fraud or other wrongdoing, as distinguished from mere mistaken belief in DBE status. Where actual wrongdoing can be shown, we will not hesitate to recommend criminal prosecution or debarment procedures.

Our goal is to set the record straight so that misunderstandings and misinformation do not continue to obscure the program's accomplishments or its successes. We hope to resolve many of these problems through our conferences, the questions and answers we send to the field, and by keeping the minority and majority contractors informed. We will continue to closely monitor the program and will conduct studies on the various problems. As we all gain knowledge and experience in this program, both the states and Federal governments expect to refine and simplify the various program procedures and policies to assure a successful program.

In concluding, I would like to state that although we are fully aware of the various problems we have experienced in implementing § 105(f), some of which I have described for you today, both the Department and the states have shown a genuine desire to address these problems areas in an effective and efficient manner. With the full cooperation of the different parties involved, the requirements of § 105(f) will be met..

PREPARED STATEMENT OF ARMANDO L. MENA, DIRECTOR, OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION, DEPARTMENT OF TRANSPORTATION

Good morning, Mr. Chairman, Members. It is a pleasure for me to appear before the Committee to provide an overview of the Department of Transportation (DOT) implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA). I am accompanied by the Administrators of the Urban Mass Transportation Administration (UMTA) and Federal Highway Administration (FHWA), Mr. Ralph Stanley and Mr. Ray Barnhart, who will provide more specific information regarding their agency's implementation of Section 105(f).

At the Department of Transportation, we are proud of the progress we have made in contract awards to disadvantaged businesses as a result of Section 105(f).

As you know, the Surface Transportation Assistance Act was passed in December 1982 and signed into law on January 6, 1983 by President Reagan. While this Act did not become law until well into fiscal year 1983, disadvantaged business enterprises (DBEs) in FY 83 received more than one billion dollars in contract awards from our highway and mass transit grant recipients. This includes $799 million in highway prime contract awards and subcontract commitments, and $298 million in transit contracts. For FHWA's 52 program recipients, this represented a nationwide average of 9.8 percent DBE participation in all Federal-aid highway contracts. For UMTA's 451 program recipients, this represented a nationwide average of 14.3 percent DBE participation in all federally assisted transit contracts.

Moreover, during the first half of FY 1984 DBEs have continued to make strong gains in highway and mass transit programs. FHWA reported a record $528 million in DBE highway contract awards and DBE subcontract commitments representing 13.7 percent of the total Federal-aid highway contract award dollars. Also, UMTA reported $143 million in DBE transit contracts which represents 12.7 percent of the UMTA funded mass transit contract award dollars. Preliminary reports show that the achievements have remained stable during the third quarter of FY 1984. If the level of achievement in the DBE program continues at its present rate during the last quarter, DBE highway and mass transit contracts are likely to exceed substantially the 10 percent participation level.

We are also proud of the results of our initiatives encouraging DBEs to participate in the program and our efforts to address concerns affecting implementation of the DBE program. Through our Office of Small and Disadvantaged Business Utilization (OSDBU), we have implemented a number of programs which assist DBE's interested in performing work on transportation-related projects. In our 12 Program Management Centers (PMC), which are located across the country, information on procurement opportunities from our grant recipients is made available to DBEs. We provide DBEs with the management and technical assistance necessary to engage in competitive bidding and perform transportation-related projects. Assistance in obtaining short-term loans and bonding is also available for DBEs through our PMCs. OSDBU has sponsored five workshops on surety bonding which are designed to provide DBEs with an understanding of the nature of the surety bonding process and the "underwriting criteria" generally employed by most surety companies. OSDBU also sponsored five seminars on the Act in order to disseminate information on the DBE program. We have also participated in numerous conferences to inform recipients and DBE's about OSDBU programs and the Act.

One other initiative being undertaken by OSDBU is the conduct of a needs assessment to determine the feasibility of OSDBU maintaining a national directory of DBEs and WBEs certified by our recipients.

The Department believes that combating abuse of the DBE program is a key to ensuring its success. Nothing can destroy the integrity of such a program faster or more effectively than its infiltration by significant numbers of "fronts", firms that are not eligible DBEs but claim to be so in order to take advantage of the program. The Department is carrying out its commitment to the integrity of the DBE program in several ways:

* The first line of defense against abuse is for recipients to have strong certification and verification programs. We consider this an important part of a recipient's overall DBE program which we emphasize as we work with recipients. This has also been one of the major subjects of discussion at the recent series of regional FHWA and UMTA conferences. We are also strongly encouraging the formation of statewide or regional organizations or cooperative agreements among recipients to help perform the certification function more efficiently and effectively.

* FHWA and UMTA, as part of their oversight of recipients' programs, frequently call to the attention of recipients potential problems with the eligibility of firms they have

previously certified. Along with recipients' periodic recertification procedures, this practice has resulted in the decertification of questionable firms and the decision by other firms not to seek continued participation in the program.

* The DOT Office of Civil Rights considers complaints alleging that firms already certified by recipients are ineligible. When the Office of Civil Rights finds that a firm is ineligible, it directs the recipient to decertify it. Likewise, when the Office finds a recipient has improperly refused to certify the eligibility of a firm, it prepares corrective action.

* The Department has recently published a new Department-wide suspension and debarment regulation. This rule gives the Department the authority to take administrative action to prohibit the participation in any DOT-assisted contract for a period of between six months and three years, of a firm that has been found guilty of a criminal offense or has engaged in conduct demonstrating a serious lack of business integrity. This rule encompasses, in appropriate situations, both "front" firms themselves and their "sponsors" (for instance, a prime contractor that sets up a front to get around DBE goal requirements).

* The Department, through its Office of Inspector General, may refer cases of suspected criminal conduct to U.S. attorneys for possible prosecution under the Federal false statements or mail fraud statutes. While the Inspector General has made a number of such

referrals, the effectiveness of this remedy has been limited by evidentiary problems and the fact that U.S. attorneys have often not assigned such cases a high priority because the demonstrable damages sustained by the Government in individual cases are often small relative to other cases. Also, these actions would focus on the DBE firms, where often it is the prime contractor that orchestrated the activity but is careful enough to limit its own filings and certifications. The Inspector General's office also assists the Office of Civil Rights and the operating administrations in decertification and suspension and debarment matters.

* The Department, through its Office of Inspector General, has instituted a Hotline Complaint Center which may be used to report suspected false front organizations. The Hotline telephone numbers are 755-1855 (Washington, D.C.), or toll free 800-424-9071. The mailing address is P.O. Box 23178, L'Enfant Plaza Station, Washington, D.C. 20024-0178. Individuals who report suspected fronts are provided confidentiality, if requested. The intent of the Department in establishing the Hotline is to protect the integrity of the Department's DBE program.

* The Department is working on administrative revisions of its DBE program regulations to strengthen and clarify the eligibility criteria; revise "Schedule A", the model certification information form, to request more specific information that will make it more difficult for ineligible firms to apply for certification

without making false statements; and make more specific the concept of "commericially useful function" to help prevent "conduit" abuses involving DBEs.

These steps, in our view, will make it increasingly difficult for persons to abuse the Department's DBE program and to avoid sanctions for their misconduct.

As you can see, the Department of Transportation is working hard to make the DBE program a success.

With your permission we would like to present all of our statements first and answer questions at the completion of our joint testimony.

I would now like to ask the Urban Mass Transportation Administrator, Ralph Stanley, to provide additional testimony on the transit DBE program.

TESTIMONY OF RALPH L. STANLEY, ADMINISTRATOR, URBAN MASS TRANSPORTATION ADMINISTRATION

Mr. STANLEY. Good morning Mr. Chairman and members of the committee. I am pleased to discuss with you the Urban Mass Transportation Administration's implementation of section 105(f) of the Surface Transportation Assistance Act of 1982. I know, Mr. Chairman, you have a particular interest in the provision. In the interest of time, and at your direction, I would like to summarize my prepared statement and ask that you include my entire statement in the record.

Mr. MITCHELL. Without objection it will be entered into the record.

Mr. STANLEY. Before I begin, I would also like to introduce Bob Owens, seated on my right, who is the Director of UMTA's Office of Civil Rights.

Mr. Chairman, UMTA as an organization shares, and I personally share, the Secretary's commitment to full and effective implementation of section 105(f). Central to that commitment is the Department of Transportation's regulation implementing the DBE program. The regulation requires each recipient that receives funding assistance over established thresholds to submit goals for DBE's and WBE's. These goals must be approved by UMTA before we award a grant. These goals cover all contracting opportunities except those for the purchase of transit vehicles. In the latter case, transit vehicle manufacturers themselves must submit goals to UMTA for our prior approval in order to be able to bid on an UMTA-assisted contract.

After the Department issued the regulation in July 1983, UMTA formed a headquarters section 105(f) task force to ensure uniform implementation of the regulation, and to provide specific program guidance to recipients and UMTA staff. That task force developed a wide range of materials, such as questions and answers concerning the regulation that was used by UMTA personnel, recipients, DBE and WBE firms, as well as material for a workshop to train our regional staff advising transit agencies about procedures for implementing the regulation.

During fiscal year 1983, UMTA identified 451 recipients that met the dollar threshold figures specified in the regulation. Even though fiscal year 1983 was a transition year for the program, awards to DBE's totaled $298 million or 14.3 percent of the total contracting funds expended. In addition, $47.4 million or 2.3 percent were awarded to WBE's.

In the first half of this fiscal year, reported contracting expenditures of UMTA recipients totaled $1.1 billion. Of that total, $143 million or 12.7 percent were awarded to DBE's. An additional $34.2 million or 3 percent were awarded to WBE's. In fiscal year 1984, we fully expect to exceed the level of DBE and WBE participation in fiscal year 1983.

We have also made substantial efforts to provide program guidance. UMTA sponsored, in conjunction with the American Public Transit Association and the American Association of State Highway and Transportation Officials, five regional DBE and WBE conferences to provide information and technical assistance concerning section 105(f) to all recipients of UMTA assistance, to transit vehicle manufacturers, and to DBE and WBE firms. I was pleased to have the opportunity to participate personally by addressing the conference held in Arlington, TX.

We have continued to emphasize compliance with the requirements of the DBE program. During fiscal year 1984 we have conducted various on-site compliance reviews including some joint reviews with the Federal Highway Administration.

Finally, one of the major efforts by UMTA to increase participation of DBE and WBE firms involves our technical assistance. One of the programs which I am particularly proud of is our demonstration bonding program. This program is designed to help alleviate problems that DBE's and WBE's face in obtaining surety bonding so that they can participate more fully in certain UMTA funded construction projects. I might add that this is a joint public private initiative. UMTA section 20 funds totalling $3 million have been committed to be combined with $3 million in private funds and leveraged to provide approximately $60 million in total bonding capacity for DBE and WBE construction contractors. Since this is a demonstration program, these funds will be available initially for transit construction projects in the four demonstration cities, Los Angeles, Houston, Detroit, and New York.

Section 105(f) has encouraged transit operators to expand their procurement opportunities among DBE and WBE's. To support those efforts, we have encouraged operators to seek section 20 funds. The technical and managerial assistance the operators can provide to local DBE's and WBE's using these funds will enhance the viability and improve the performance of participating DBE's and WBE's.

This fiscal year I have authorized the approval of grants and cooperative agreements in support of those objectives which exceed $4 million, an appreciable increase over fiscal year 1983 funding.

In conclusion, I would like to say that we are working to implement this significant provision of the STAA through innovative as well as traditional initiatives. We believe that the total dollar level of DBE's funded in fiscal year 1984 will be significant, and we trust that our ongoing outreach programs and technical assistance will achieve even higher levels in future years.

The committee has expressed an interest in knowing the funding provided by UMTA to certain States in fiscal year 1983 as well as fiscal year 1984 as well as the total contracting dollars available to provide contracting opportunities in fiscal year 1983 and fiscal year 1984. I would be very happy to submit that information for the record. Thank you.

Mr. **Mitchell**. We would like to receive that information within 10 days.

Mr. **Stanley**. Certainly.

Mr. **Mitchell**. Thank you very much.

[Information requested above follows:]

U.S. Department of Transportation,
Urban Mass Transportation Administration,
Washington, DC, September 28, 1984.

Hon. Parren J. Mitchell,
Chairman, Committee on Small Business,
House of Representatives, Washington, DC.

Dear Mr. Chairman: During my testimony on September 19, 1984 before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems, I agreed to provide the Committee with the enclosed information.

Thank you once again for providing me the opportunity to discuss with your Subcommittee my agency's implementation of section 105(f).

Sincerely,

Ralph L. Stanley.

Enclosure.

The information listed below outlines the total dollars available to provide contracting opportunities and dollars awarded to DBE's in fiscal year 1983 and 1984 in Maryland, Virginia, South Carolina, New York, California, Illinois, and the District of Columbia. The amount available for contracting opportunities will be affected by factors such as the number of transit vehicles purchased. The dollars awarded to DBE's will be affected by factors such as the contracting opportunities available.

	Total contracting dollars	Dollars to DBE's	Percent
Fiscal year 1983:			
Maryland	10,197,965	2,229,711	21.9
Virginia	2,372,660	305,508	12.9
South Carolina	104,183	3,892	3.7
New York	473,033,814	61,639,202	13.0
California	452,461,446	60,902,178	13.5
Illinois	180,976,531	4,784,484	2.6
District of Columbia [1]	202,200,673	72,556,974	35.8
Fiscal year 1984 (9 month totals):			
Maryland	22,302,615	4,734,668	21.2
Virginia	3,574,574	304,606	8.5
South Carolina	226,597	65,626	28.9
New York	327,233,042	32,394,171	9.9
California	287,469,717	34,587,914	12.0
Illinois	56,912,483	6,517,684	11.5
District of Columbia [1]	92,866,967	21,720,769	23.4

[1] Includes funds to jurisdictions in Maryland and Virginia (for WMATA and Metropolitan COG). The total contract awards for the District of Columbia are larger than the total funds provided because the contract awards in fiscal year 1983 and fiscal year 1984 were made from grants

awarded in previous fiscal years. Undoubtedly, many of the contract awards during fiscal year 1983 and fiscal year 1984 were for Metrorail construction.

The information listed below outlines the total dollar amounts provided by UMTA for Maryland, Virginia, South Carolina, New York, California, Illinois, and the District of Columbia. The amount of funds provided depends on factors such as the number of transit agencies within each jurisdiction.[1]

	Fiscal year 1983	Fiscal year 1984
Maryland	$82,388,456	$33,167,540
Virginia	26,680,175	22,897,322
South Carolina	3,288,674	7,437,834
New York	735,426,564	663,893,143
California	524,205,605	542,602,175
Illinois	301,253,623	262,039,962
District of Columbia [1]	45,591,665	63,872,345

[1] Includes funds to jurisdictions in Maryland and Virginia (for WMATA and Metropolitan COG).

TESTIMONY OF RAY A. BARNHART, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION

Mr. **Barnhart**. Mr. Chairman and members of the subcommittee, I am pleased to be here and discussing our role in implementing 105(f). I want to say I pay tribute to employees of Federal Highway generally because I commend them for their wholehearted support in trying to develop reasonable, logical, and effective procedures for implementing this provision as mandated to Congress. I think it has been the most successful program, and I would of course point out that the efforts in the Federal Highway Administration preceded the 105(f) provision. That is, for several years we have had programs to encourage the development of minority businesses and their involvement in the construction area.

In the year preceding my coming to Washington, FHWA succeeded in getting $230 million awarded throughout the country to minority businesses. During my first year we raised that to $355 million, and subsequently to $415 million. With the enactment of the 1982 act, we already had in effect goals established by the States for minority involvement in the construction area. We took the first quarter goals and prorated the 10-percent goal that the Congress had mandated to have an adjusted goal which represented the increased goal as mandated by the Congress, which then brought our goal to less than 10 percent for that year, since the first quarter had already expired.

In spite of that, I think the States did a superb job with some very difficult conditions in trying to immediately get more minorities involved in the program, and we succeeded in getting $799 million into the system through minority businesses. The trend has continued. We had an excellent subsequent year. I think that the goals, as a matter of fact, for next year will be increased above the 10-percent goal in several States. I am convinced that we will have another record year of minority involvement. We have been working to improve the functioning of the program and to eliminate barriers to participation. We have worked with the States. Many of those States have eliminated bonding requirements for jobs less than $500,000, et cetera. They have come up with all kinds of innovative procedures in order to encourage the development of minority businesses, and I think effectively so as demonstrated by the record. We have a record number of certified DBE firms; right now we have some 10,000 DBE and WBE firms in spite of the fact that several thousand have been removed from certification.

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[1] UMTA funds (Sections 3, 5, 8, 9, and 9A) have been provided to State departments of transportation, transit agencies and planning agencies in the jurisdictions listed above. The dollar figures shown are an aggregate total of those funds.

We have an increasing emphasis ongoing through the program to assure ourselves and the Congress that we do not have an abundance of frauds, fronts, and other abuses of the program, and I think it is being effectively handled.

We have scheduled seven conferences throughout the country to discuss the problems associated with implementation of this provision. We have completed five of those conferences, and we will have two additional ones this coming month. In those conferences we bring not only the State people to meet with the Federal folks so that we can get together and get some consistency in interpretation of enforcement, but we also bring majority and minority firms together so that we can resolve our mutual problems, not through confrontation but through rationalization in order to make an effective program.

We have had problems in the past on the reporting of the contracts and the commitments. We have developed a new form so that we can get that problem under control. I am not about to tell you that we have not had problems, because working with the number of jurisdictions we have had to work with we have had inconsistencies. I believe our new reporting form will give us a more accurate view of what the program is. It is a big program, roughly $1 billion, and when I look at the period of time of implementation I think we have made remarkable progress. Certification, validation of legitimate firms is a massive problem when you look at the 10,000 or so firms that are involved. We are conducting reviews and we are asking every State to do an annual review of certifications because there has been abuse. On a proportionate basis, I would expect that the abuse is less than a lot of people would suspect. We will also be going on the street for a study of the total impacts of the DBE program on the minority as well as the majority community. This study will provide better data so that we can evaluate the progress and the effectiveness of our programs.

One of our big problems in getting the program going is to clarify misinformation and misunderstandings regarding the program, and they have been abundant. Many people have interpreted the 10-percent minimum as mandated by the Congress as requiring a 10-percent set-aside on each and every specific project instead of regarding the 10 percent as a goal for the State as a whole, or whatever the goal has been approved for the particular State.

It has caused a lot of problems. I think most of those are getting behind us at this point, and I am very pleased with the progress we have made. Some of the folks have equated the lesser goal on specific jobs as lost funds, lost to disadvantaged businesses, failing to realize that we must have a variation of that goal depending upon, in many instances, the nature of the job, or the physical location of the job within the State. The important thing for those folks who do not understand it is to recognize that the goal is for a statewide accomplishment rather than in each geographical area of the State.

I think our point is being made. I want to assure the committee that we feel very strongly about our responsibilities in implementing the provision of 105(f), not only because it is the law or because it is a constitutional guarantee of equality and access to participating in the system, but we regard it as a moral responsibility as well.

I would like to submit a total statement for your consideration, and be very pleased to respond to any questions you might have.

Mr. MITCHELL. Thank you very much, and thank you to all of the witnesses.

Mr. MENA. I would like to introduce Greg Wright on my right. He is the Deputy Director in the Small Business Office of Transportation, and Ed Quick of the Federal Highway Administration.

Mr. MITCHELL. Let me say first of all, I was chatting with Mr. McDade during the time of your testimony however, I was listening at the same time. We both agree that historically, over the last 10 to 14 years, the Department of Transportation has been more responsive, at least conceptually, to minority business programs than any other agency in the Government. It didn't matter what resident it was in. Apparently there is something kind of unique about the Department of Transportation in terms of attempting to carry out the law, and I commend you for that, and I commend you for your excellent testimony.

But let me hastily add that I am in no way completely satisfied, and I will raise a series of questions in just a moment. I do want to acknowledge Ms. Bryant, our staff person, who headed up the project on the excellent job she did in getting this hearing together with the cooperation of everyone else. I also want to acknowledge the presence of attorney Anthony Robinson, president, Minority Business Legal Defense and Education Fund, which was incorporated to handle class cases in courts involving minority businesses in any violation of law perpetrated by any agency of Government at any level.

Mr. McDade?

OPENING STATEMENT OF HON. JOSEPH M. McDADE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. McDADE. Thank you, Mr. Chairman. We regret, of course, that the Secretary is otherwise occupied and cannot be here, but we recognize that problem. I do want to offer my congratulations right now to all of you for the excellence of your testimony, and for what is obviously a strong effort on the part of this fine Department to move the country ahead.

Since the act has been in effect for nearly 2 years this is an appropriate time to see if it is working. I have asked the Department of Transportation to provide me with figures on awards in Pennsylvania and hope they will be able to provide these figures for us this morning.

I also hope that we can learn ways to solve some of the problems, from our witnesses this morning, that the chairman referred to in his opening statement.

The chairman is accurate. We were talking as you were offering your testimony about how the Department functions on this program, and indeed in so many where you, in my judgment during my 22 years on the Hill, before the Department was created, watching you grow, have seen you really trying to respond to all kinds of problems.

The Secretary can't be here, but she sent a team of very able people. I want to welcome you, congratulate you on your testimony. I may not be able to return for the full hearing. As I indicated to the chairman, we have an Appropriations Committee meeting in parallel, but we have a series of questions which we will be submitting for the record. I may have to come in and out, but I want to underscore my interest in what you are doing and commend you on the excellent efforts that you have achieved so far. We look forward to working with you. Thank you.

Mr. **Mitchell**. I will be here for the duration.

Mr. **McDade**. Excuse me. We have a vote on I have to attend at the Capitol. Congratulations to you. I look forward to working with you.

Mr. **Mitchell**. In your testimony, Mr. Mena, you indicated that approximately $1 billion had been achieved for minority businesses. That is in what timeframe?

Mr. **Mena**. That is in the timeframe from fiscal year 1983.

Mr. **Mitchell**. Also in your testimony you indicated that that was counting commitments and actual awards?

Mr. **Mena**. It was counting commitments and awards, yes.

Mr. **Mitchell**. Why would you count commitments in that fiscal year?

Mr. **Mena**. I think each one of the particular modes has a different structure, but I think some of the highway projects that are done you count a commitment because the work is going to be done over the fiscal year.

Mr. **Mitchell**. You have a problem then. The law is very clear that there is a set-aside for each of the fiscal years. You can't count a commitment to do something in 1985 and include it in your goal in 1984. You can't do that. The bottom line is the award, the dollar amount of the award.

Mr. **Barnhart**. Mr. Chairman, if I might, we do have a disagreement on the counting of commitments as well as contracts, but for a very practical reason. Many of our contracts go over a period of several years.

Mr. **Mitchell**. I am well aware of that.

Mr. **Barnhart**. Therefore, many contracts are not awarded on that same money within that fiscal year. It poses some serious problems.

Mr. **Mitchell**. I am well aware of that procedure.

Mr. **Barnhart**. We are also developing procedures in order to monitor those contracts to ensure that the commitment for subcontracts is met in subsequent years.

Mr. **Mitchell**. I am totally familiar with that procedure, and I respectfully submit to you that a prime could enter into a contract with a minority business firm. In 1983 the contract is entered into and he could say we will not get to that phase of minority work until 3 years later. Down the line in 3 years he may well say, look, I can't find the minority to do the job, and you've already counted that as a part of meeting your goal.

Mr. **Barnhart**. Yes, sir, but at the time of contract award the general contractor, in most instances, lists the subcontractor or the certified DBE who is committed to get that contract. That cannot be changed without specific reasons and approval of the State. So we do monitor that. We have had problems in the past on that, but I do think that we have developed procedures now which tighten that up.

Mr. **Mitchell**. Forgive me. The number of years I have spent in the Congress has made me rather cynical and distrustful. It may well be that you will monitor this very closely, but I will still insist that it is wrong to try to count a commitment in a fiscal year as a part of meeting the award because no matter how effectively you monitor, there is no way that you can guarantee that in the fourth year of a contract, or the third year of a contract, the prime might come in and say, well, I really wanted to do this, but for XYZ reasons I can't, and give very compelling reasons, and he will be awarded his part of the money.

I would urge that you reconsider that business of counting commitments in a given fiscal year. That does not, I repeat, does not give an accurate picture as to the money that is going to minority business. May I just continue for a moment, please? I don't think this agency wants to be charged with duplicity or anything else, and I don't think this method has come about because of any desire to be duplicitous. On the other hand, the bottom line is what dollars go into the hands of minority businesses in a given year. That is the bottom line. Every large corporation in this country doesn't count commitments. It writes up its volume of business in a given year. It counts the dollars, and I would respectfully urge that you carefully reconsider that and drop that commitment to do something as being a part of the counting in any fiscal year. When the actual award is made to the minority, that is when it should be counted.

Mr. **Barnhart**. Mr. Chairman, we also report the actual contract awards, and on our form you will see the actual dollars that are awarded.

Mr. **Mitchell**. That is precisely where I am going. In those cases where you talk about $1 billion being awarded to minorities, how much of that was commitment and how much of that was actual dollar value?

Mr. **Barnhart**. We have $720 million in actual contract awards, and we had an additional $79 million in commitments for ensuing years.

Mr. **Mitchell**. That doesn't add up to $1 billion.

Mr. **Stanley**. UMTA just counts awards in our contribution to $1 billion, and there are no commitments included in our total amount.

Mr. **Mitchell**. That is the way to do it, any other way gives a very false picture of what your accomplishments are. Now let me pursue another line. I will take more than 5 minutes because the other members are not here.

I will be the first to concede that the Department of Transportation, many years ago, initiated affirmative action programs that were not required by law and really attempted to meet those goals. However, this hearing is on just one narrow phase of your entire work. This is just on the Surface Transportation Act. I want to find out from you, how can we be guaranteed that FAA minority business is excluded from the Surface Transportation Act? How are you assured that it is not counted as a part of the Surface Transportation Act?

Mr. MENA. In our new DOT procedure that we sent over to OMB it is departmentalwide, and through our tracking system we will be able to identify the FAA, identify each one of the DBE programs by mode. So we will be able to treck within the Small Business Office each one of the various contractors by name and by contract award so we will be able to sort out any——

Mr. MITCHELL. I have a particular interest in this piece of legislation, and I am concerned with quantifiable results under just this section, not what you did in the past, not what you did in another facet of activity in DOD, but what have you done in terms of complying with the provisions of this law. You are now assuring me that account will involve only those facets of your activities covered under the Surface Transportation Act?

Mr. MENA. Yes.

Mr. MITCHELL. Do you keep a breakdown by categories of minorities? In the most extreme case you could say, well, not a billion because I don't count the commitment, but the $790 million in actual awards.

Mr. QUICK. $720 million.

Mr. MITCHELL. In the most extreme case——

Mr. BARNHART. That is only in Federal Highway.

Mr. MITCHELL. I want to know under the Surface Transportation Act what is the total amount of awards?

Mr. MENA. $998 million.

Mr. MITCHELL. That is awards? That is not including commitments?

Mr. MENA. Yes.

Mr. MITCHELL. All right. In the most extreme case, is it possible theoretically for all Asians to have received the entire $900 million-plus? What I'm asking is do you keep a breakdown by categories: blacks, Hispanics, Asians, Americans, American Indians, and so forth?

Mr. MENA. In the Federal Highway Administration we do, yes.

Mr. MITCHELL. Under the Surface Transportation Act?

Mr. MENA. Under the Surface Transportation Act. Under the new DOT procedure we will be able to track that for all modes the same way. We have sent our form and our procedure over to OMB.

Mr. MITCHELL. This is a new procedure?

Mr. MENA. Yes.

Mr. MITCHELL. When was it instituted?

Mr. MENA. As soon as we get approval from OMB.

Mr. MITCHELL. Was there no procedure for breaking this down by categories in the past?

Mr. MENA. There was in the Federal Highway Administration.

Mr. MITCHELL. I am talking about the Surface Transportation Act. That's what this hearing is about. Now was there a procedure for breaking this down under the Surface Transportation Act?

Mr. MENA. No.

Mr. QUICK. Mr. Chairman, the Federal Highway Administration did internally maintain records separating ethnic group awards under the 1982 act, and we do have that statistical data.

Mr. MITCHELL. You are not the total agency. The Federal Highway Administration is only a part of the agency. What really perplexes me is how in the world you can have this law and not have had the foresight to break it down by ethnic categories, or other categories. It could be all women who have gotten the contracts, all American Indians, and that would not be fair in any sense of the word. When do you plan to institute this so that they will have a more accurate picture?

Mr. MENA. During this next fiscal year.

Mr. MITCHELL. Wasn't it possible for you to ask the States, some of which keep such a breakdown, for that information?

Mr. MENA. I think we are in the process of doing that.

Mr. MITCHELL. But it was not done.

I am not going to keep you much longer. Really it should have been just you all day long because I have that many questions, but I don't want to hold up the other witnesses.

Has clear information gone out to the States that under the existing regulations if and when a State fails to meet its set-aside goal in a given fiscal year, the shortfall is picked up in the next fiscal year? Has that been passed out to the States? Now, I will admit the first year is a little unusual because of the time, the 3-month delay, but let's say in 1984 the State of Maryland reaches only an 8-percent level. There is a shortfall of 2-percent which means that in 1985 it would be 10 plus 2. Has that been made expressly clear to the States? That is what the regulations say.

Mr. MENA. I will defer that question to Mr. Barnhart.

Mr. BARNHART. In the Federal Highway, no, sir, but the States are meeting their goals.

Mr. MITCHELL. I am talking about the Surface Transportation Act.

Mr. BARNHART. You don't want one element.

Mr. MITCHELL. I want just this law that we are dealing with now. The regulations that apply to this law are very clear. They say if Maryland doesn't make the 10 percent in any given year—we will sort of forgive the first year because of the time delay—then its shortfall is picked up in the next year and instead of a 10-percent goal it might be a 12-percent goal. Has that information been disseminated to the States?

Mr. MENA. No, Mr. Chairman. What we are asking States to do is justify their shortfalls in terms of why they were not able to meet their goals.

Mr. MITCHELL. Don't you think it would be prudent to advise the States of this? Otherwise, when you get them in the next year and say your goal is near 12 percent or 15 percent, they are going to throw up their hands and say we'll never make it. Wouldn't it be prudent to do that?

Mr. Mena. I don't believe our regulations state that.

Mr. Mitchell. They do. Yes, they do. That was one of the things we insisted on. I would suggest you go back and check your regs.

I was very pleased to hear your testimony about onsite compliance. That is the only way to do it, to go out and check and see what is being done. I am interested in your decertification procedures. I am delighted that you are going after the front companies. I, frankly, don't think there are many front companies. I know there are greedy, wicked people in the world who love money so much they would lie on any occasion to try to get their share of it, but I frankly don't believe that there are that many front companies. I think this myth is perpetuated by the opponents of this program to suggest it is in shambles. In your opinion, the existence of a front company is a criminal act, isn't it?

Mr. Mena. Not necessarily.

Mr. Mitchell. Why wouldn't it be?

Mr. Mena. It would depend on the criminal intent. Somebody may be certified and not necessarily have any criminal intent doing it. It would depend if they were in it to actually defraud.

Mr. Mitchell. A front is going to know what he is doing. He is going to go up and find somebody and jack them up into some kind of a position and say you are the president of the corporation knowing that they are not. It seems to me the mere fact that they file papers under that guise is demonstrable evidence of criminal behavior. The reason I am pressing the issue is I want them to go to jail. I want them sitting up in jail. Every front company takes away from legitimate minority business companies, and I want you to refer them to the Justice Department for prosecution. I want them to sit in the same cell singing, "Ebony and Ivory Live Together Again." Do you intend to refer these cases to the Justice Department for prosecution? You can debar. You can decertify. What about referral for prosecution?

Mr. Mena. In those instances where we find criminal intent we will refer them to the Justice Department.

Mr. Mitchell. I have kept you more than my time. Congressman, do you have questions?

Mr. Hayes. Just one question, which may have already been answered. If so, I would like your indulgence. Sometimes it is good to be repetitive. What are the problems you have encountered with the States regarding reporting and abuse?

Mr. Mena. I would like to have each one of the Administrators respond to that.

Mr. Barnhart. I guess that would vary from State to State. We have had a multiplicity of allegations.

Mr. Hayes. I am primarily concerned about Illinois.

Mr. Barnhart. A lot of it has been through misinformation on the 10-percent goal where some folks have felt it must be applied to each particular project.

Mr. Mitchell. Would the Congressman yield to me for just a moment? You insist on goal and I insist on set-aside. A rose by any other name smells the same, but in the original conception we talked about a set-aside so it would be very clear. If you want to use goal, that is all right with me, but the law still says at least 10 percent and that to me constitutes a set-aside. Thank you for yielding. I wanted that clarification made.

Mr. **Barnhart**. Obviously our regulation does not construe the program as a quote "set-aside" in that sense.

Mr. **Mitchell**. That was the rewrite that your agency did. It was the intent of the Congress as the law was passed it would be a set-aside. However, it is not really a debatable issue. You meet the goal. I don't care what you call it.

Mr. **Barnhart**. That is correct, and, quite frankly, some of the complaints are that many States are interpreting this as a set-aside. Quite frankly, set-asides are totally permissible under our regulation within the States depending upon the State law. So we have 7 or 8 States that do utilize the set-aside provision. Again, we are playing games with semantics. We have pushed the States extremely hard in order to reach the goal as established in the law. Some States have not met that, but those that have not, I think you will find this year we have had 9 States increase their submitted goal, and I think two are requesting a slight decrease, maybe one point or something. We have had a considerable amount of problems, many problems, primarily through misunderstanding I believe, on the quota or the goal.

Mr. **Hayes**. You are very kind I must say.

Mr. **Barnhart**. We have been the middle folks on this and we have been so abused. I don't know which side is sorer, the left or the right. We are getting both the minority as well as the majority contractors, so I guess we are probably doing it about right. But the States are in fact increasing significantly the contracts that are going to DBE first. What are some of the abuses? The alleged fronts, and there are some, and quite frankly we do have four right now that we are looking at with the view of debarment, not just decertification. But here we get into a real gray area as to intent in a firm that may have been decertified because perhaps they were never really truly eligible for certification, and now on the audit they have come back and become decertified. Many people construe that as criminal intent. It may in fact not have been, but the program has grown so rapidly in a brief period of time there have been some abuses. I think the abuses are overstated. We believe that there are several instances where there was criminal intent involved in an effort to gain certification to abuse the program. We are looking at those. They are being examined right now by the IG. If in fact those allegations are supported, they in fact will be debarred. I have stated all over this country that we will get after these shyster firms, whether they are fronts and frauds in the DBE program, just as we will against majority contractors who cheat on bids. I think both of them are a disgrace to the system and we will not condone it in this operation.

Mr. **Hayes**. I just want to respond to what the gentleman has said but it is a misunderstanding on the part of some of them. I don't think I can accept that because experience has taught me where there is this much green involved there is not usually a misunderstanding. No further questions.

Mr. **Mitchell**. Thank you very much.

Mr. **Stanley**. From UMTA's standpoint, we have not experienced difficulty on the reporting side. Our recipients, to be clear, are not only the States but the transit authorities, such as the CTA, the RTA in Illinois, and we have, through the good efforts of Bob Owens, implemented the quarterly reporting system used by all the transit authorities as opposed to only the States. We have not experienced a number of abuses to date from the States or transit authorities.

Mr. MITCHELL. We will hear from the Maryland authorities later on. In fact, they are the next witnesses. But I think we put one person in jail recently, and I hope it was in one of the worst jails in the State.

Congressman Wyden is unable to be with us. He has a series of six questions and his opening statement. If you will respond to those questions within 10 days, Mr. Mena, we'll appreciate it, or ask the Secretary to do that.

Also, I don't want to do this publicly, but slip a little note to any member of my staff letting them know the names of the two States that have attempted to decrease their participation.

Mr. BARNHART. There have been two I believe that have requested, but they have not been approved. We are still analyzing.

Mr. MITCHELL. I like to have the jump on everything, even though it has not been acted on, could you let me know the two?

Mr. BARNHART. We would be very happy to. I think in some instances where they have established their record in the past and now we have gone through on the recertification to route out those firms that are not eligible, it has decreased the number of available firms that they feel they can rely on. They are, I think, very genuinely determined to make whatever goal they submit and which is approved.

Mr. MITCHELL. In a most timely fashion, give me the names. Thank you very much. If any of you can stay throughout the entire hearing, there may be some other questions that arise as a result of the statements made by other witnesses. So if some of you can stay we might ask you some questions later. Thank you very much.

Also, Congressman McDade has some questions he will insert for the record.

[Mr. McDade's question and reply from Federal Highway Administration follows:]

BONDING

Question. For years minorities have been having problems getting bonding required to bid on major contracts. What are you doing to help?

Answer. Disadvantaged businesses (DBE's) and women-owned businesses (WBE's) have traditionally experienced problems in obtaining bonding. Many State and local laws require agencies to obtain surety bonds from contractors. It is also the policy of many general contractors to require their subcontractors to secure adequate bonding. The most common reason for requiring contractors to secure bonds is to minimize the risk of damages to the government agency due to default by the contractor. It is the Department of Transportation's policy to respect these local decisions as long as there is no evidence of exclusionary or discriminatory practice. Notwithstanding, we are making a concerted effort to help DBE's and WBE's to meet local bonding requirements.

For example, the operating elements of DOT have requested all DOT recipients to reexamine their bonding requirements to assure that they do not unduly restrict participation of DBE's in DOT-assisted contracts. In addition, the Department's Office of Small and Disadvantaged Business Utilization has entered into a contract with the Fireman's Fund to provide bonding to DBE's where needed.

The Urban Mass Transportation Administration has a major bonding demonstration program under way, funded under section 20 of the Urban Mass Transportation Act. The program will be tested in four cities: Los Angeles, New York, Houston, and Detroit. It will combine $3 million in Federal funds with $3 million in private funds to leverage a total bonding line of $60 million which will be made available to DBE's and WBE's participating in certain UMTA-assisted transit contracts. This program is tied to specific transit construction projects in the four demonstration cities. No contracts have yet been let for these construction projects, so no bonds have been issued. However, the mechanism is in place to issue bonds when the first related construction contracts are let.

In addition, a consultant under contract to UMTA has recently issued a "DBE Brief" on "Surmounting Bonding Barriers." This paper explains the basic types of bonds and outlines the problems commonly encountered by DBE's in obtaining bonding. It also summarizes methods of technical assistance, direct assistance, and local assistance used by local governments and organizations to help DBE's and WBE's obtain bonding.

Mr. MITCHELL. The next witnesses are Alfred D. Watts, director, Office of Fair Practices, and Stanley Tucker, executive director, Maryland Small Business Development Financing Authority.

TESTIMONY OF ALFRED D. WATTS, DIRECTOR, OFFICE OF FAIR PRACTICES, MARYLAND DEPARTMENT OF TRANSPORTATION

Mr. WATTS. Mr. Tucker will be able to discuss the kinds of things that are going on in Maryland to provide technical assistance. Now you asked for the dollars appropriated. I provided that in my testimony, but quickly, it's some $414 million in 1983 and $4 million plus in 1984.

Mr. MITCHELL. What was the dollar figure again?

Mr. WATTS. In fiscal 1983, the appropriation is $414 million. In fiscal 1984, the appropriation is $354 million, for a total of $768 million for the 2 fiscal years. But the actual contracting amount, that which was contracted for fiscal year 1983 was $319 million, of which $51,733,771 went to DBE's. During fiscal 1984, we had a total of $331,328,845 contracted, of which $41,082,088 went to DBE's.

Now, in effect, what that breaks down to is something like a 12.5-percent DBE participation over the 2 years. Excuse me, it is 14.257 DBE participation over those 2 years. We had a 16-percent DBE participation in fiscal year 1983, and a 12-percent DBE participation for the total. The DBE's in Maryland for those 2 fiscal years received, in terms of canceled checks, $92,815,859 for those 2 years.

Again, my presentation is rather short. I expect to get some questions, and I would also like, Mr. Chairman, with your permission, to have Mr. Stanley Tucker give you some information as to how Maryland is proceeding with regards to technical assistance to DBE's.

Mr. MITCHELL. We are delighted to see you again, Stan. You and I have worked together throughout the years and we will be delighted to hear from you.

[Mr. Watts' prepared statement follows:]

PREPARED STATEMENT OF ALFRED D. WATTS, DIRECTOR, OFFICE OF FAIR PRACTICES, MARYLAND DEPARTMENT OF TRANSPORTATION

Mr. Chairman and the Honorable Members of the Committee on Small Business, my name is Alfred D. Watts and I am the Director, Office of Fair Practices, Maryland Department of Transportation. I am representing Governor Harry R. Hughes and Secretary William K. Hellman for the purposes of this hearing.

The purpose for my being here is to address the six (6) specific areas identified in a letter to Governor Hughes from you, Mr. Chairman, regarding the implementation of Section 105(F) requirements of the Surface Transportation Assistance Act of 1982 (STAA).

Those six (6) areas are:

A. Maryland's certification process and how it addresses program abuse;

B. Maryland's procedures to insure compliance with Section 105(F) regarding DBE participation;

C. Maryland's management information system for collecting and compiling data on DBE participation under the Act;

D. Other problem areas that have been identified which impact on DBE participation and performance in Maryland;

E. The total dollar amount of the funds appropriated by (federal) DOT to Maryland under the STAA for Fiscal Years 1983 and 1984; and,

F. The amount of that total that Maryland has used to provide contracting opportunities for DBEs for Fiscal Years 1983 and 1984.

I will address each of these areas individually and then I will be prepared to answer any questions you or other members of the Committee may wish to ask.

A. Maryland's Certification Process and How It Addresses Program Abuse.

Maryland has taken the position that "fronts" not only damage the integrity of the DBE Program, they (fronts) also siphon off millions of dollars which should be spent with bona fide DBEs. Consequently, the Maryland certification process was developed to insure that only bona fide DBEs are permitted to participate.

To accomplish this, Maryland employs six (6) full-time investigators who conduct comprehensive research in the pertinent areas surrounding each applicant for DBE certification. A summary is prepared and presented to a certification committee comprised of public officials and representatives of the private sector. Each applicant is asked to appear before the committee and answer questions regarding the bona fides of the firms in question. The committee, then, advises the committee Chairman as to whether the applicant meets the ownership and control requirements as set forth in Maryland's DBE Program. If the facts warrant, a review by the Maryland Attorney General's Office is conducted regarding any firm which may have violated the State's MBE Fraud Statute. To date, one firm has pleaded guilty to MBE fraud and one person has pleaded guilty to attempted bribery in connection with actions aimed at influencing the outcome of a committee determination.

B. Maryland's Procedures to Insurance Compliance with Section 105(F) Regarding DBE Participation.

To insure compliance with Section 105(F), Maryland has developed and implemented DBE participation procedures which are an integral part of the contracting and procurement process.

The DBE participation procedures are included in the bid documents and the contracts to ensure enforceability.

Once a contract is awarded, Maryland assures that the dollars committed to DBEs are actually spent with DBEs via an aggressive contract compliance monitoring program. In addition to an on-site review of the project, Maryland requires the submission of copies of cancelled checks made payable to the DBE at the time of the compliance review. The DBE is then contacted to verify that the money was actually received by the DBE for services rendered.

C. Maryland's Management Information System for Collecting and Compiling Data on DBE Participation Under the Act.

The previously mentioned contract compliance process coupled with the cancelled check monitoring process remains the primary means of data collection and compilation. The cancelled check method, which includes a follow-up of the DBEs to insure payment, provides an accurate measurement of program effectiveness in terms of money actually spent with bona fide DBEs.

D. Other Problem Areas That Have Been Identified Which Impact on DBE Participation and Performance in Maryland.

The major areas of concern remain access to capital for business growth and bonding.

Maryland, however, has begun to take steps which should, in part, address these problem areas. The Maryland Small Business Development Financing Authority (MSBDFA) is an agency within the Maryland Department of Economic and Community Development. MSBDFA has recently obtained State funding authority to permit DBEs to obtain capital for bonding and government contract funding.

At present, MSBDFA will guarantee up to ninety percent (90%) of any loan amount for contract related capital requirements up to $1,000,000. The DBE must apply with MSBDFA and have a government contract in hand.

MSBDFA has requested the introduction of a bill to fund previously passed legislation which provides for bonding assistance. If the funding is provided, MSBDFA will be able to guarantee up to $150,000,000 in bonds on government contracts.

These steps should provide much needed relief to the emerging DBE market in Maryland.

E. Total Dollar Amount of the Funds Appropriated by DOT to Maryland Under the STAA for Fiscal Years 1983 and 1984.

Pursuant to the Surface Transportation Assistance Act of 1982, the appropriations for Maryland during Fiscal Years 1983 and 1984 are as follows:

1. Fiscal Year 1983 - $414,068,192
2. Fiscal Year 1984 - $354,115,368

The total appropriations for these two (2) Fiscal Years are $768,183,560.

F. The Amount of that Total that Maryland has Used to Provide Contracting Opportunities for DBEs for Fiscal Years 1983 and 1984.

Prior to providing these figures, it should be noted that Maryland does not differentiate between STAA funds and matching State funds. For the purposes of DBE participation, all funds, both STAA and matching State funds are governed by Section 105(F) requirements. Further, the figures reflect actual dollar amounts paid to DBEs during the respective Fiscal Years. This does differ somewhat from reporting requirements used by some jurisdictions.

With the above in mind, DBE participation for Fiscal Years 1983 and 1984 are as follows:

1. Fiscal Year 1983 - A total of $319,037,889 was awarded during the period of July 1, 1982 to June 30, 1983. $51,733,771 was paid to DBEs during that reporting period for a total of 16.22% DBE participation.
2. Fiscal Year 1984 - A total of $331,328,845 was awarded during the period of July 1, 1983 and June 30, 1984. $41,082,088 was

paid to DBEs during that reporting period for a total of 12.40% DBE participation.

In summary, a total of $650,366,734 was awarded during Fiscal Years 1983 and 1984. A total of $92,815,859 was paid to DBEs during these reporting periods for a total of 14.27% DBE participation.

I hope I have addressed the specifics of the Committee's inquiry of the Maryland DBE Program and I stand ready to answer any questions that members of the Committee may wish to ask.

# # #

TESTIMONY OF STANLEY TUCKER, EXECUTIVE DIRECTOR, MARYLAND SMALL BUSINESS DEVELOPMENT FINANCING AUTHORITY

Mr. TUCKER. Thank you, Mr. Chairman, and it is indeed a pleasure to be here. As you know, this is one of our first laws. We have been at this for a while. The State of Maryland has done a fairly good job financing in my area. As you know, minority firms have been able to obtain contracts, but have had a lot of problems in obtaining working capital to perform on those contracts. Maryland has been very progressive in this area. They have established an organization, which I am executive director of the Maryland Small Business Developing Financing Authority which was established in 1978 and became operational in 1980 to really fill the gap, if you will, to provide working capital financing to minority firms that are unable to obtain the Federal, State, or local government contract.

To be quite candid with you, the initial setup of the program, as you know, Mr. Chairman, there are times when these programs are set up to fail. I think initially that was what happened in this State. However, with the strong support from the Maryland legislative caucus, it did a good job in turning that around. We have had relatively good success, Mr. Chairman, but there is still a lot of room for improvement. For example, from the lending area, once the contracts have been awarded, then they come to us, and we have seen some strange things happen. Even after they have been awarded the contract, and even after we have provided them with financing to perform on these contracts, we have had some situations where literally the general contractor has done some maneuvering to take the contract from the minority person for various reasons. We have been able to deal with that somewhat because we have been on top of it; especially when they find out we are monitoring, then they kind of back off of that. But those are just contracts that we provide financing through, Mr. Chairman. I really don't know with regard to what is happening to the other contracts where we don't have that kind of close monitoring. I would suggest that maybe that needs to be looked into as well.

Also, Mr. Chairman, another major problem is bonding. This last session, with the wisdom of the Maryland General Assembly, and tremendous support from you and the Maryland Legislative Black Caucus, we were able to pass legislation to set up a bond guarantee program. We got the legislation through, and this coming year we are hoping to get the funding to capitalize that program. We want to seek funding at a level of $12 to $15 million.

Of course you know bonding is always a major problem, and in our short analysis we found that it was a serious problem for small and minority firms. We still have to work closely with sureties so hopefully they will be working along with us on this particular program, but bonding is a problem.

Also, another problem that needs to be looked at, Mr. Chairman, in the State of Maryland, is even though the contracts are being awarded, from a lender's point of view, from where we sit, we would be expecting the minority firms to be lined up at our doors. Now, there is a lot of activity. I am not saying there isn't a lot of activity, but we are saying there would be a lot more activity considering the numbers that Mr. Watts has just given to you, the kind of dollar volume that is being generated in the State. Either one of two things is happening. It could be good, or it could be bad. Either the general contractors are providing financing for these minority firms, or the minority firms are establishing conventional relationships with conventional financial institutions which is good. However, we don't know that. That may need to be looked into, Mr. Chairman, to see how these other firms are financing their contracts. It would be interesting to find out because they are really kicking the door down the way we think they should be with regard to our particular program. Again, I don't want to emphasize it. There is a lot of activity, but as you know, there is still a lot of concern about access to capital for minority businesses.

Mr. MITCHELL. Thank you. Because I do represent the State of Maryland I am kind of on top of the situation. I think in general the State has performed very well in terms of implementing the law. I have a couple of questions.

Mr. Watts, what is the average length of time for your State's certification process?

Mr. WATTS. There are two. We have a fast track system. If there is a proposed DBE that is on a contract and there is a need to fast track that proposed DBE very quickly, it can be done with our investigators investigating the firm within a period of about 10 to 15 working days. Now, if you just get in the line with anybody else, it generally runs about 2½ months. For whatever the reason, we are inundated with requests for certification.

Mr. MITCHELL. Yes, I can understand. About how large is your waiting list now for certification?

Mr. WATTS. Very large. Let me explain, Mr. Chairman. We found ourselves in an unenviable position of certifying for the rest of the country. I am not saying that is good, bad, or indifferent, but the Maryland certification is generally accepted nationally, so we run across a lot of situations where firms that may wish to do business in Maryland, but also want to do business some place else will come to us rather than we go to them. They know that if they are certified by Maryland, some of the other States will accept the Maryland certification.

Mr. MITCHELL. That is a tribute to your effectiveness, but I don't think that should be taking place.

Mr. WATTS. Well, it happens, Mr. Chairman.

Mr. MITCHELL. I think you might want to consider stopping that because it means that somebody in some other State is not doing his on her job thoroughly. They ought to be able to certify.

Mr. WATTS. We try to work cooperatively. As you know, we started a conference movement for Federal-aid recipients, and the reason for the conference movement was to develop this kind of working relationship nationally with all kinds of people, and we do work that way.

Mr. MITCHELL. I am all in favor of cooperative relationships. I am also all in favor of sharing the work load, and I just don't think it is right that your State and mine has to take on that awesome responsibility. I asked you a question a few moments ago about approximately how many firms are waiting to be certified, and you said a lot. That doesn't mean much to me. Can you give me a number figure?

Mr. WATTS. We currently have about 500 or 600 firms that are on our registry. I would suspect that we have another 150 to 200 somewhere in that pipeline.

Mr. MITCHELL. It takes about 2½ months for each one of those to be certified?

Mr. WATTS. That is correct.

Mr. MITCHELL. On a regular track?

Mr. WATTS. On a regular track. That is assuming that they provide us with all the information. We have a lot of situations where someone will send us the affidavit without providing the other information. We have to go back and ask them for the documents not submitted.

Mr. MITCHELL. I am talking about a complete submission. Can the decision to certify or not to certify be arrived at in about 2½ months?

Mr. WATTS. Right.

Mr. MITCHELL. I am very pleased also that you have a breakdown by ethnic categories. There is no reason for any State not to do that, and I hope that we will get together with DOT and make that an SOP procedure. Otherwise, you really don't know whether minorities are sharing equally under the provisions of this law.

Throughout the years that I have been in this business I have heard the view, "I just can't find one," and always when pressure is applied that minority business can be found. What specifically do you do to help prime contractors locate eligible minority businesses?

Mr. WATTS. It is interesting that you ask me. I was discussing a particular problem just like that yesterday with a contractor, and the sum was a considerable amount. The contractor alleges that he can't do this, and he can't do that, and we are talking about an eight figure sum of money. So we are just going to ask him to leave and go someplace else. We have done that a couple of times.

Mr. **Mitchell**. In other circumstance how would you try to locate eligible DBE's?

Mr. **Watts**. Mr. Chairman, that really hasn't been a problem. I've heard that time and time again. We have looked at a number of things and to my knowledge it is not a problem. It is a problem only if you make it a problem. With the myriad of MBE's and DBE's within the State of Maryland, and I can only speak for Maryland, it really is not a problem. It does become somewhat of a problem as you move into the western Maryland panhandle, and we recognize that and work with that. As you move toward the metropolitan area, as you move into the Washington metropolitan area, even into the Pennsylvania area, it is not a problem.

Mr. **Tucker**. Mr. Chairman, I would like to address that just for a minute. There is something that Mr. Watts isn't aware of. It is still kind of on the drawing boards, but within the department of economic and community development—as a matter of fact, we just had a meeting this past Friday—Dr. Cleveland Chandler, who you are familiar with, submitted a proposal to the department to develop a data base, if you will, of primarily black businesses in the State of Maryland using Baltimore as a pilot. Basically, the essence of that data base will be used as a strategic planning mechanism for the city as well as the State in answering the question, and that question is asked a lot or said a lot, "we can't find qualified minority businesses." While this data base would be utilized once it is compiled and developed, it will be given to every department within the State so that while they are sitting down planning, doing their capital planning, and so forth, that they could automatically, if you will, involve minority business persons, or minority businesses in their planning process. That is currently in the process of being developed.

Mr. **Mitchell**. That's very good, but I am amazed that there is no such data base. We've had a program in the State of Maryland. We've had some kind of program in the city of Baltimore, and no one had the foresight to develop a data base before this.

Mr. **Tucker**. That's right, Mr. Chairman. Their listed, if you will, all over the place, but there is not a comprehensive data base within the State of Maryland, and I have been in this area for a while, Mr. Chairman. I could be wrong. I would love to be wrong. I really don't think that one exists in the country, a comprehensive one. I guess you have to define comprehensive.

Mr. **Mitchell**. Yes, that's incredible.

Mr. Hayes, do you have any questions?

Mr. **Hayes**. In the interest of time, I only have a couple of quick ones. One has two parts to it.

The first question can be answered by Mr. Watts. You mentioned one conviction. I didn't understand clearly. What was the basis of conviction?

Mr. **Watts**. In Maryland we have a MBE fraud law. It's against the law, it's a violation of Maryland statute to be a front to attempt to obtain moneys that you are not entitled to. We have made several referrals. We had two convictions thus far with several more that are in the pipeline, and I can't discuss them, but there are several more that are prime candidates.

Mr. HAYES. The other question is do you think that your State's financing program can be used by other States? If so, will you assist other States in establishing a similar financing program?

Mr. WATTS. I am going to defer to my friend, Mr. Tucker, who takes care of all the financing.

Mr. TUCKER. To answer your question, yes. By the way, our program is unique in the country, and we are having the same problem that Mr. Watts is having where everyone is coming to us wanting us to help them set up their program.

However, I haven't been as generous as Mr. Watts at this juncture because I think there are still a lot of kinks in which we have to work out so that not only will we be able to tell them what to do and how to do it, but also we will be able to tell them what not to do, which is very important because we are still in a learning curve if you will, and there are opposition and kinks within our legislation that we have to make corrections to as well to really make it operate and be effective as it definitely can be. But it definitely can be used as a model.

We are currently being used as a model, if you will, At the small business conference last year, our particular organization has been used as a model with a few others, but everyone is looking at us right now.

Mr. HAYES. Thank you.

Mr. MITCHELL. I have just one last question. I am beginning to get a little trickle of reports which say that the prime will engage a minority subcontractor, and when that subcontractor's work is 60-, 70-, or even 80-percent complete, for one reason or another, the prime then drops that sub saying you did this wrong, and, therefore, I am terminating the contract. It is a vicious system because it means that he gets 80 percent of the subcontracting work done for free by not paying. Have you encountered this kind of situation, Mr. Watts?

Mr. WATTS. No; we did a survey a couple of years ago because I wanted to find out, first of all, are we doing what we are suppose to be doing. We took about 300 contracts and they were reviewed by our internal audit staff. These 300 contracts were picked arbitrarily all over the State, and the contracts contained at that time I think some 500 MBE subcontracts. We found, among other things, that, first of all, there was only one default. Everybody else had done the job properly. So under those 300 projects involving DBE's, there was only one default.

The jobs are being done adequately. They were being done well. They were passing inspection. I did run across maybe one other situation where because the DBE was not doing his job properly he was dropped, but that was at the very beginning of the job. With the inspectors, the contract compliance procedure, the cancelled check method, and the review of DBE books and records. These procedures tend to alleviate that kind of a problem.

Mr. MITCHELL. I want to commend you for the work you are doing. I would hope that other States would be as vigorous and aggressive as you are and actually look at the canceled checks. I am not that much of a believer in good will and good faith, and I think to make this program work effectively and to find out where the dollars are really going, that is what you have to do. So I hope the other States would follow that example. I do commend you on the good work that you are doing.

However, if you were a member of my staff, you would know what I was going to say next. You can do more and you can do better. Thank you very much, gentleman.

Mr. **Watts**. Mr. Chairman, before I leave, I agree with you. That is why we increased the goal in Baltimore City to 15 percent.

Mr. **Mitchell**. Good. Thank you very much. If you can stay around, I may have some additional questions.

Our next witnesses are from the New York Department of Transportation: Michael Nairne; James Larocca; and Howard Sheffey.

TESTIMONY OF MICHAEL NAIRNE, DIRECTOR, GOVERNOR'S OFFICE OF CONTRACT COMPLIANCE AND MINORITY AND WOMEN'S BUSINESS DEVELOPMENT, STATE OF NEW YORK

Mr. **Mitchell**. Are the other witnesses here?

Mr. **Nairne**. No. Mr. Sheffey is on his way. I hope he will be joining me while I am giving this speech.

Mr. **Mitchell**. What about the other witnesses?

Mr. **Nairne**. The Commissioner was not able to make it. I am here on behalf of Gov. Mario Cuomo. I am his deputy secretary for Contract Compliance and Minority and Women-Owned Business Enterprises.

Mr. **Mitchell**. I appreciate your being here.

Let me just say this very quickly. I have been a Member of Congress for a long time and I respect the institution. I do get a little upset when there is any attempt to treat a congressional hearing in any kind of a cavalier fashion. I am not saying that you are, but people know that they are scheduled to be witnesses, and it seems to me that as a matter of respect for the entity known as the Congress and its various committees and subcommittees, they will honor those commitments.

People also know that when you come for a hearing like this we can't tell how long it will take, but if you are committed to being here, you are here. I must say that I am slightly disturbed.

Mr. **Nairne**. I can certainly understand that, but the connections coming out of Albany are sometimes difficult, and I believe Mr. Sheffey was delayed.

Mr. **Mitchell**. Generally, if I am going to be in California to speak on a Friday night, I might leave Thursday just to make sure that I avoid bad connections. It [illegible] a matter of respect to the host group that is inviting. All right, fine. I don't want to pursue this. Proceed with your testimony.

Mr. **Nairne**. Mr. Chairman, as I said, my name is Michael Nairne, and I am deputy secretary to Governor Mario Cuomo in the State of New York. I have been given the primary responsibility as deputy secretary to direct his Office of Contract Compliance and Minority and Women-Owned Business Enterprises. In this capacity the Governor has asked me to come down and express his and our appreciation in the State of New York for allowing us to present testimony and to respond to any questions that you may have.

Mr. **Mitchell**. Thank you for being here.

Mr. **Nairne**. As requested in your letter to Governor Cuomo, I believe you received a number of copies.

Mr. **Mitchell**. Yes, we have the testimony which is under the name of Mr. Nairne and Mr. Sheffey, and that entire testimony will be submitted for the record. I would recommend that you summarize and highlight the major points that you want to make.

Mr. **Nairne**. With that in mind, I will read certain sections of the testimony and try to highlight on some of the problems that we have encountered in the State of New York.

A demonstration of our commitment is found in the reports of minority, women, and disadvantaged business participation that steadily increased since the program was begun in 1977. We began this undertaking in 1977. Minority business participation in the New York State Department of Transportation Construction Program was less than 1 percent. In contrast to our beginning, in the year ending August 1983, we reported a full 16.3 percent participation on projects which were funded by Federal assistance, and a full 14 percent of participation on those which were funded entirely with New York State funds.

In fiscal year 1984 for the 11-month period ending August 20, we have a 10.9 percent disadvantaged business enterprise and a 2.75 percent women's business enterprise participation on federally assisted projects. On our projects which are paid for solely with our State funds, our results are 12.3 percent minority and disadvantaged business enterprise and 3.5 percent women's business enterprise participation. I believe a copy of the Summary of Procurements for fiscal years 1983 and 1984 is attached to the testimony.

You may note that our use of terms disadvantaged and minority businesses in federally funded and State projects has a different application. I will explain these differences later.

In addition to the Federal requirements under this important act, let me pause to tell you about our major initiative in New York. Last year Governor Cuomo in his first state of the State message as Governor proposed a bold and indeed historic measure. As a result of the Governor's concerted effort on its behalf, the $1.25 billion rebuild New York bond bill was overwhelmingly passed by the New York State Legislature and a subsequent referendum was approved by our citizens. A cornerstone of this vitally needed measure are provisions that provide for equal employment opportunity, training, and participation by minority and women's businesses in any projects whether federally assisted or not. To further underscore our commitment, Governor Cuomo promulgated Executive Order No. 21 to establish as New York State's policy the need to enforce equal employment opportunity, provide training to racial minorities and women, and to increase participation of businesses owned and controlled by minorities and women in New York State procurement.

Mr. **Mitchell**. May I interrupt you for just a moment, and I don't ordinarily do this? I would appreciate it if you would cite from your testimony information that is relevant to just this hearing. This hearing is on the Surface Transportation Assistance Act, and that is what we are making an inquiry into. I think the Governor should be very proud of all the other things he has done, but we are dealing with a relatively finite area.

Mr. **Nairne.** I am trying to give you the framework of some of the things that is going into our DBE program and some of the new things that are happening in the State that we think is going to allow for a much better record in New York State, and perhaps serve as a model nationally.

As a result of this executive order, which I mentioned previously, my office was created to coordinate and develop programs to assist minority businesses. As a result of that, we really inherited a situation where certification was being done by one agency. In particular, that was the Department of Transportation, but there were several other agencies that had compiled lists of registries of sorts that were being utilized to reach percentage goals on contracts. One of the first things since I came into this position was to try to consolidate and coordinate into one certification program that we are about to implement. So this program that I am referring to is done to reduce the number of submittals from minority businesses and women's businesses so that they can have one source that would be reciprocally recognized by all State agencies in the State of New York, and also perhaps the local agencies that might have in their local ordinances goals for minority and women, businesses; but in particular as relates to DBE and the Surface Transportation Act, there are several other problems that we encounter that I'd like to reference. Under New York State finance law, a successful bidder is required to post a bid bond which guarantees that they will perform the items of work in the contract as depicted by the contract at prices which were bid. The State must award this contract within 45 days from the bid date in order to hold a contractor accountable for this performance at the prices which were bid. The process of fulfilling the disadvantaged and women's business enterprise requirements is now averaging 29 days from bid opening with a larger number of contracts being recommended for award on the 42d and 43d days with the 45-day period. We since then, over the last year, have initiated a new bonding assistance program that is administered through the jobs development authority which can leverage about up to $80 million in bonding assistance through minority and women's businesses, and we hope that will assist in allowing greater participation in minority and women's businesses on the public work contracts and federally assisted public work contracts.

The other thing that we have started is the technical assistance delivery. The New York State Department of Transportation has contracted with four consultants to deliver various types of technical assistance to minority, women, and disadvantaged business enterprises. Over the past several years, we have had contracts with the contractors training development office, the inner city management corporation, Burgos & Associates, and Arawak Consulting Corp. Each of these contracts required that the consultant deliver special services to minority, women, and disadvantaged business enterprises. At this time we have active contracts which have received Federal Highway Administration supplemental agreement to expand their service delivery. The expanded service will include a diagnosis of the problems, prescription of remedies, and development and delivery of corrective action to the companies which have been so diagnosed.

In addition to technical assistance, we envision the development of a training circuit wherein specialty consultants would present items of importance to contractors which could be availed of in accordance to their perception of their individual needs.

Mr. Chairman, as requested in your letter of invitation, the department has prepared a summary of the total dollar amount of funds appropriated by the U.S. Department of Transportation to the New York State Department of Transportation under the Surface Transportation Assistance Act for fiscal years 1982, 1983, and 1984.

In addition, we have also supplied information on the amount of these funds which were contracted out. The third segment of the summary includes the amount of the contracted funds which were contracted to disadvantaged and women's business enterprises. These figures are reported in the disadvantaged and women's business enterprises respectively.

I want to thank you, Mr. Chairman, for an opportunity to speak and will entertain any questions.

[Mr. Nairne's prepared statement follows:]

PREPARED STATEMENT OF MICHAEL NAIRNE, DIRECTOR, GOVERNOR'S OFFICE OF CONTRACT COMPLIANCE AND MINORITY AND WOMEN'S BUSINESS DEVELOPMENT, STATE OF NEW YORK

My name is Michael Nairne, Deputy Secretary to Governor Mario Cuomo of the State of New York. I am the Director of the Governor's Office of Contract Compliance and Minority and Women's Business Enterprise Development and in this capacity I have been delegated to represent Governor Cuomo before this committee on the subject of disadvantaged business enterprise participation under the Surface Transportation Assistance Act of 1982. On behalf of Governor Cuomo, I am pleased to express his and our appreciation for the opportunity you have given us to address this committee and to respond to any questions you may have.

We are very proud of our accomplishments to date and we are equally proud of the ambitious goals we have set for New York State. We will meet our goals and we will expand the base of our participation even further in the future. We stand ready to assist your Committee in your efforts as we have assisted the Federal Highway Administration, the U. S. Department of Transportation, and other states in making available to them the results of our efforts and accomplishments and the benefit of our experience.

Accompanying me is Mr. Howard L. Sheffey, Director of the Transportation Affirmative Action Programs Office of the New York State Department of Transportation who will be able to reply in more detail on issues which may be raised by the committee. As requested in your letter to Governor Cuomo, a number of copies of this testimony have been forwarded to the committee.

Although these remarks are directed at the items raised in your letter of invitation, we will rely on our responses to your questions and the information previously furnished to your staff to explain in detail the accomplishments of the New York State Department of Transportation. The Department has agressively pursued the provisions of Section 105(f) of the Surface Transportation Assistance Act of 1982 and the implementating regulations in 49 CFR Part 23. We deeply appreciate and support the central role that you, Mr. Chairman, and this Committee has and continues to play in this particular program. The State of New York has made a commitment of resources to insure the success of our minority, women and disadvantaged business enterprise program.

A demonstration of our commitment is found in the reports of minority, women and disadvantaged business participation that has steadily increased since the program was begun in 1977. When we began this important undertaking in 1977, minority business participation in the New York State Department of Transportation Construction Program was less than 1 percent. In contrast to our beginning, for the year ending August 1983, we reported a full 16.3 percent participation on projects which were funded by federal assistance and a full 14 percent of participation on those which were funded entirely with New York State funds. In fiscal year 1984 for the 11 month period ending August 20, we have 10.9% disadvantaged business enterprise and 2.75% women's business enterprise participation on federally assisted projects. On our projects which are paid for solely with our state funds, our results are 12.3% minority and disadvantaged business enterprise and 3.5% women's business enterprise participation. A copy of the Summary of Procurements for fiscal years 1983 and 1984 is attached to this presentation and is provided for the record.

You may note that our use of terms disadvantaged and minority businesses in federally funded and state projects has a different application. I will explain these differences later.

In addition to the federal requirements under this important act, let me pause to tell you about our major initiative in New York. Last year Governor Cuomo in his first State of the State message as Governor proposed a bold and indeed historic measure. As a result of the Governor's concerted effort on its behalf, the $1.25 billion Rebuild New York Bond Bill was overwhelmingly passed by the New York State Legislature and a subsequent referendum was approved by our citizens. A cornerstone of this vitally needed measure are provisions that provide for equal employment opportunity, training and participation by minority and women's businesses in any projects whether federally assisted or not. To further underscore our commitment, Governor Cuomo promulgated Executive Order No. 21 to establish as New York State's policy the need to enforce equal employment opportunity, provide training to racial minorities and women, and to increase participation of businesses owned and controlled by minorities and women in New York State procurement. As a result of this legislation and the Governor's Executive Order, the state is developing a unified minority, women and disadvantaged business enterprise certification procedure that will serve the following purposes:

- Reduce the number and frequency of submittals of applications by minority, women and disadvantaged businesses.

- Consolidate the criteria for eligibility.

- Conduct training programs to reflect the uniform application of these criteria and establish several forums wherein aspiring businesses may be heard and given due process in matters pertaining to certification and decertification, challenges to either of these processes, or any other questions of propriety arising out of their eligibility.

- Our program will be decentralized with 5 or 6 state agencies designated as certifying agencies. It is important to note that certifications by any one of these agencies applying the same general principals will apply to all state agencies. The State of New York recognizes that in matters pertaining to certification of companies doing business with the New York State Department of Transportation, there is also an appeal mechanism to the U. S. Department of Transportation. We have transmitted the draft program to the Federal Highway Administration for their review and concurrence so as to insure there will be complete compliance with all federal requirements.

o The New York State Department of Transportation as required by 49 CFR Part 23, has developed a program for the participation of disadvantaged/women's business enterprises in our construction program as well as purchases and professional services. To briefly summarize, this program includes the following.

The Transportation Affirmative Action Programs Office assigns goals to projects based upon the dollar value, the location of the project, whether it is materials or labor intensive, and the Department's knowledge of the availability of disadvantaged or women's business enterprises which possess the knowledge, skills, ability and other resources to perform required work on the projects. Note: Although the Department uses its own knowledge of existing companies in making these assessments, it does not preclude the use of companies which are unknown to the New York State Department of Transportation but which may be proposed by the general contractor to perform items of work on the project. In accordance with the provisions of 49 CFR Part 23, the New York State Department of Transportation's program allows the low bidder on projects which have disadvantaged and women's business enterprise goals, a reasonable time (within 10 days after their receipt of the contract for execution) to notify the Department of their schedule to fulfill the assigned goals.

If the low bidder fails to meet the assigned goals and to furnish the Department with satisfactory documentation of its efforts which resulted in failure, the Department is likely to either award the contract to the next low bidder or withdraw the contract from the bid list to be rebid on a later date. At this reporting, there have been three instances wherein the contract was awarded to the next low bidder.

Our compliance program subsequent to the award of the contract requires that the general contractor as well as disadvantaged and women business subcontractors submit periodic reports which inform the Department of the total amount of work performed, the amount paid and amount of work performed, paid for and which remains to be performed by the effected disadvantaged and women business enterprise contractors. The written reports must be verified by the Department's project engineer. In addition to the written reports the Department conducts periodic site visits as well as compliance review visits to verify that the promises which were made as a condition for the award of the contract are actually being kept at the implementation of the contract.

At this time the New York State Department of Transportation compiles its record of minority, women and disadvantaged business enterprise participation manually by summarizing the number of subcontractor approvals which are approved by our 11 Regional Construction Offices and our Main Office Contracts Bureau which is the final point of execution of agreements with contract engineers. The rules require that any general or subcontractors which performs work on a project under our sponsorship must be approved by the respective Regional Construction Engineer. The approval form includes a caption wherein note is made if a subcontractor is a disadvantaged or women's business enterprise.

By compiling information from these forms, the Transportation Affirmative Action Programs Office verifies that promises which were made at the time of the letting and award are being kept in the implementation of the respective contract. A substantial period of time may have lapsed between the promise which was made in the schedule prior to award of the contract and the actual implementation of the work. In addition to certification that the work was performed, the New York State Department of Transportation is vigilent in verifying that the work was performed by the disadvantaged or women's business enterprise that had been previously scheduled to do so.

As a result of our monitoring of ongoing projects, we have developed a system by which the disadvantaged or women business enterprise contractors which violate the terms of the disadvantaged and women business enterprise program may be reviewed administratively to determine if their certification as a disadvantaged or women's business enterprise should be continued or revoked. By implementing this process we expect we will be able to maintain the program's integrity by insuring that sanctions which should be imposed, will be imposed swiftly and with certainty. Our one concern in the application of the decertification process is that there be equal application of this process in every instance.

We recognize that decertification of a disadvantaged or women's business enterprise is not the sole final solution to the activities which led to their decertification. These activities could not have been carried on without the knowledge or participation of general contractors. To this end the Department has sufficient mechanisms in place to impose appropriate sanctions for violations by general contractors who circumvent the disadvantaged and women's business enterprise program.

Problem Areas:

- Under the New York State Finance Law, a successful bidder is required to post a bid bond which guarantees that they will perform the items of work in the contract as depicted in the contract at the prices which were bid. The State must award this contract within 45 days from the bid date in order to hold a contractor accountable (via the bid bond) for this performance at the prices which were bid. The process of fulfilling the disadvantaged and women's business enterprise requirements is now averaging 29 days from bid opening with a larger number of contracts being recommended for award on the 42nd and 43rd days within the 45 day period.

- Goal attainment in New York State Department of Transportation contracts has largely been achieved in the "speciality areas" of work called for in contracts. The result of this type of participation is that the type of work traditionally subcontracted has not increased but the number and percentage of participation by disadvantaged and women's business enterprise has grown from less than 1% in 1977 to the point where we have achieved and exceeded the goal which is mandated by Section 105(f) of the Surface Transportation Assistance Act.

  - The New York State Department of Transportation does not permit substitution for any disadvantaged or women's business enterprises by the general contractor without prior approval by the Transportation

Affirmative Action Programs Office. Substitution is only approved under circumstances which are related to the disadvantaged or women's business enterprises inability to perform the work during the period in which it is required to be performed or some other issue which impacts on the actual performance by the previously designated disadvantaged or women's business enterprise. In no case will a substitution be approved based upon the general contractor's ability to obtain a "better price".

The numbers and value of contracting opportunities have met the assigned goals. We are not satisfied, however, that we have achieved a broad based participation by the disadvantaged and women's business enterprise community. Our emphasis is and continues to be to expand this participation to include a larger number of contractors and vendors.

Bonding and access to capital for start-up funds remain a major problem even in view of the U. S. Department of Transportation's program which involves the program management centers, the Fireman's Fund and the Atlanta National Bank..

The committee's call letter mentioned several problem areas which were to be dealt with in this forum. The following actions have been taken by the New York State Department of Transportation on these matters.

Bonding

The State of New York has initiated a program for the availability of bonding assistance. The funds for this program "The Bonding Assistance Experiment" (BAX) are derived from our Job Development Administation under the New York State Department of Commerce. Under this program, the State has agreed with an insurance broker consultant for the state to assume a subordinated role in the guarantee of a substantial portion of a bond which is made available to a qualifying minority or women's business enterprise. A company must have been refused bonding at least twice by a bonding surety in order to be eligible for the BAX program. The New York State Department of Transportation forwarded literature on the BAX program to all contractors who were enrolled in the minority, women and disadvantaged business program to insure their awareness of the program's existence. To date the responses to this mailing has not been as high as we had originally anticipated.

Technical Assistance Delivery

The New York State Department of Transportation has contracted with four consultants to deliver various types of technical assistance to minority, women and disadvantaged business enterprises. Over the past several years, we have had contracts with the Contractors Training Develoment Office (CDTO), the Inner City Management Corporation (ICMC), Burgos and Associates (Burgos), and Arawak Consulting Corporation (Arawak). Each of these contracts required that the consultant deliver special services to minority, women and disadvantaged business enterprises. At this time we have active contracts with Burgos and Arawak. We have received concurrence from the Federal Highway Administration to add a supplemental agreement to the Arawak contract to expand their service delivery. The expanded service will include a diagnosis of problems, prescription of remedies and development and delivery of corrective action to the companies which have been so diagnosed. In addition to direct technical assistance, we envision the development of a training circuit wher in specialty consultants would present items of importance to contractors which could be availed of in accordance to their perception of their individual needs.

Disadvantaged Business Enterprise -v- Minority Business Enterprise

o The U. S. Department of Transportation's definition of disadvantaged business enterprise differs substantially from the New York State Department of Transportation's definition of a minority business enterprise. This disparity creates some problems in our implementation of a modified decentralized certification program that is reciprocal throughout the state. This is one of the areas that we are proposing to discuss with the Federal Highway Administration in an attempt to resolve any substantive differences which may exist.

MENTOR PROTEGE PROGRAM

Another area upon which our focus is directed is a means by which a mentor protege program can be utilized without it becoming a front or sham operation. Several demonstration projects are underway in New York State wherein the general contractors as well as subcontractors have been required to specify the target items of work, which individuals will perform these items, and the extent to which the general as well as the subcontractor will share the work, their employees and equipment. New York State believes that this mentor protege program may be a major step forward in the program.

Mr. Chairman, as requested in your letter of invitation, the Department has prepared a summary of the total dollar amount of the funds appropriated by the U. S. Department of Transportation to the New York State Department of Transportation under the Surface Transportation Assistance Act of 1982 for fiscal years 1983 and 1984. In addition we have also supplied information on the amount of these funds which were contracted out. The third segment of this summary includes the amount of the contracted funds which were contracted to disadvantaged and women's business enterprises. These figures are reported under disadvantaged and women's business enterprises respectively.

We thank you for the opportunity to speak on the behalf of Governor Cuomo and the citizens of the State of New York. It is our firm belief that the New York State Minority, Women and Disadvantaged Business Enterprise Program will continue its success of providing its participants with greater opportunity to participate on federal and state contracts. We will continue in our effort to provide business opportunities, access to capital, bonding and technical assistance to companies that desire to do business with New York State or other contractors that do business with the State. In addition to improving our own program, we would be happy to assist this committee in any manner deemed appropriate to make the national program as successful as ours in New York State.

THANK YOU.

Mr. MITCHELL. Thank you very much for being here. I thank the Governor for allowing you to be here. Let me go back. Let me keep stressing what I am talking about, the Surface Transportation Act. Anything else that you accomplish in any other area, strict use of State funds is applaudable, but we are zeroing in on the Surface Transportation Act only. Do you count commitments?

Mr. NAIRNE. No, we don't.

Mr. MITCHELL. You count actual awards?

Mr. NAIRNE. Commitments are not counted in our figures as presented.

Mr. MITCHELL. That's good. You can't take a commitment down to the supply store to purchase merchandise.

How long does it take New York State under the Surface Transportation Act to certify a minority firm?

Mr. NAIRNE. Why I mentioned the executive order before is because a similar problem that Maryland expressed that they are certifying for the country. The Department of Transportation in New York State has experienced problems of trying to certify for the entire State, and that has been a major problem. Right now admittedly there has been quite a backlog in the certification.

Mr. MITCHELL. What is the average length of time?

Mr. NAIRNE. I would say that sometimes it ranges in a period of 5 to 6 months.

Mr. MITCHELL. That's incredible. Would it be as much as 9 months which is the figure that we have gotten most frequently?

Mr. NAIRNE. In some instances it has been that long.

Mr. MITCHELL. But don't you understand that is really preventing participation in the program?

Mr. NAIRNE. I understand that, sir, and that is why we in fact have made it an important part of this program to have a revised program which we have submitted to the Federal Highway Administration as of, I would say, 3 or 4 weeks ago for their approval. We found that the program as is presently being administered is far too long and cumbersome for effectiveness.

Mr. MITCHELL. Did New York meet its goals in the first year?

Mr. NAIRNE. Yes.

Mr. MITCHELL. What percent?

Mr. NAIRNE. Under consultant dollar value we reached nine. For Federal and State we reached 12.1—excuse me. From September 1982 to August 1983 we met 9, and from March 1983 to August 1983 we have 12.1.

Mr. MITCHELL. Don't you see in that first year you fell short? Had you been able to certify more promptly, you might have met your 10-percent goal.

Mr. NAIRNE. Under construction we did reach. We had an 11.8 DBE from September 1982 to August 1983.

Mr. MITCHELL. Were you here when Mr. Watts testified about the fast track system?

Mr. NAIRNE. Yes.

Mr. MITCHELL. Would you consider utilizing that?

Mr. NAIRNE. What we are about to administer is a process which will cut down the time considerably. We are going to put the onus on several State agencies which will allow greater numbers of staff doing certification. Up to an area of 40 to 45 persons will be doing the certification in the State of New York, and it will be reciprocally accepted by all State agencies. It will have a process where the Department of Commerce will work with those businesses who have submitted their applications, and they will be submitted through the Department of Commerce. The completed applications will then be distributed to the various agencies according to geographical location or the type of business it is for certification. At that point we will be able to cut down on the incomplete applications because the Department of Commerce has a technical assistance unit which will be assisting businesses in the completion of applications, and only complete applications to certifying agencies. We also can control work load for all the various agencies so that there will be an even distribution among those agencies.

Mr. MITCHELL. Under the Surface Transportation Act, how many dollars actually went to minority businesses in this first round? I think you gave me a figure for 1983-84. What is the total dollar volume?

Mr. NAIRNE. For September 1982 to August 1983.

Mr. MITCHELL. Now, you can't do that because the Surface Transportation Act did not come into existence in September 1982, so you can't count that.

Mr. NAIRNE. I can give you the figures for March 1983 through August 1983. On federally assisted it is 12.1 dollar value less $31,305,776.

Mr. MITCHELL. I am afraid I am not making myself clear. Under the Surface Transportation Act a certain amount of money is given to each one of the States during the course of the fiscal year. I think we had testimony and the actual contracts let by the State was given. We had testimony that Maryland received approximately $361 million and the actual contracts that were let totaled $319 million. That is the kind of information that I want.

Why don't we let that pass for now. Do you break down your contracts by ethnic groups under the Surface Transportation Act?

Mr. NAIRNE. No, Mr. Chairman. We break it down according to disadvantaged, and we have them broken down by women, DBE and WBE.

Mr. MITCHELL. Are you satisfied with that kind of breakdown?

Mr. NAIRNE. No, I'm not quite frankly.

Mr. MITCHELL. Do you intend to change it?

Mr. NAIRNE. Yes, we do.

Mr. MITCHELL. When?

Mr. NAIRNE. That is why I was mentioning Executive Order No. 21. There is going to be a wide sweeping change on how data is kept in the State of New York.

Mr. MITCHELL. You see, if you keep it just by disadvantaged, it could be one group, let's say blacks, getting 95 percent, and Hispanics getting only 5 percent. You don't want to administer a rule like that, do you?

Mr. NAIRNE. One of the reasons why we are starting a new program is because there has been disparity by agencies in keeping records. We've had problems in getting agencies to be responsive as well as the contractors, so we are trying to have a complete program that will allow for access to capital and will allow bonding. It will allow for certification and will have a complete data base for minorities by race, and for women by gender.

Mr. MITCHELL. Please understand me. I am not denigrating you, but based on what I've heard this has been a sloppily administered program by the State. It's just sloppy. There is no other word to describe it, and my fear is that out of that sloppiness New York has been subjected to a great deal of criticism by the operators of other programs. Obviously, if you don't have tight administrative procedures in place, and certainly if you have a sloppy administration, you are going to have front companies.

Mr. NAIRNE. With all due respect, I would say that there have been some reports that have been circulated about fronts and shams in New York State which were pointing at the State of New York, but, in fact, close scrutiny would show that many of the problems that existed came on a county level and in some cases the local administration of ordinances that were passed and were in fact not a part of the Surface Transportation Act, nor a part of the State program for minority and women business.

Mr. MITCHELL. I have two more questions. Congressman Hayes, why don't you get your questions in if you so desire. I have two that I am very concerned about.

Mr. HAYES. Mr. Chairman, I don't have any questions. I just want to commend the young man for having the courage to come here and try to deal with this important matter concerning the most popular State in the Union where I know we do have problems. I just wanted to commend him.

Mr. MITCHELL. Again, I want to express that this is not any attack on you, but this is near and dear to my heart. When I see any entity really not administering it properly—I don't care what you tell me, up to this point it has not been administered properly in New York State—I get very upset and understandably so. You have a peculiar entity up there called the mentor protege program. What is that?

Mr. NAIRNE. Several demonstration projects are underway in New York State wherein the general contractors as well as subcontractors have been required to specify the target items of work which individuals will perform these items, and the extent to which the general as well as the subcontractor will share the work, their employees and equipment. New York State believes that this mentor protege program may be a major step forward in the program.

To be quite honest with you, Mr. Chairman, I expected Mr. Sheffey to explain certain programs that were being administered by the Department of Transportation.

Mr. MITCHELL. I understand. I withdraw that question. But you might relate to Mr. Sheffey that I have some concerns about that program because it does seem to me it creates at least a potential climate for front companies.

There is one other practice that is followed which I have concerns about. You may or may not be able to comment on it. It is my understanding that prime contractors in New York are allowed to list their minority business participants, but those minority business participants may have not been certified by the State of New York, is that correct? A prime gets a project and he says, look, I am bringing in my own minority business. But that MBE is not certified by the State. We have had reports, pretty authentic ones, that the practice is common in terms of the implementation of the Surface Transportation Act.

Mr. NAIRNE. As I stated before, the certification as a policy statement that was issued in March of this year as it relates to the use of minority and women businesses to meet goals, we have established what the Department of Commerce is registering as allowable by the State of New York as well as the Department of Transportation. Really what that consists of is the Department of Commerce does a desk audit and they in fact do not do a field audit. That is what we are about to check in terms of the entire program.

Mr. MITCHELL. Then up to this point, that which I just referred to you has been a practice?

Mr. NAIRNE. It may have happened. I don't know for a fact that on DOT projects they have allowed commerce businesses, but to my knowledge DOT tries to certify all businesses that do business with the Department of Transportation. But there may have been. I won't say to you, Mr. Chairman, that there hasn't been because I don't know for a fact that the Department of Transportation has not utilized Department of Commerce's registry since in fact it has been a policy of the State that we will allow the Department of Commerce's registry to be utilized.

Mr. MITCHELL. Do you have any further questions, Mr. Hayes?

Mr. HAYES. No.

Mr. MITCHELL. Obviously you are placed in a difficult position. I won't ask you any further questions, but I will tell you now that 6 months from this date I am going to ask my staff to visit New York to see whether or not the implementation of this law has been tightened up. Honestly, I am not satisfied, and obviously you are not. Otherwise, you wouldn't be instituting the procedures. I am just shocked that a State like New York would permit a law to be in effect for almost a year and not establish some tight administrative procedures. I am not blaming you, and I am not attempting to chastise you in any way because you can't answer some of the questions because the other two witnesses didn't bother to show up. Thank you for being here.

Mr. NAIRNE. Mr. Chairman, in closing, I have been in this position since the end of January of this year, and I think that we have made great strides in trying to improve what we admittedly feel has not been the best of programs for a State as large as New York. I do feel that the problems with the certification has been a little bit overblown as far as New York, and reports have been circulated about the fronts and shams. To my knowledge, and we have checked all reported fronts and shams that have turned up, have not appeared on the Department of Transportation's list. So, once certified, we have, I think, a good and thorough certification procedure.

Mr. MITCHELL. In 6 months I will ask the staff to visit New York to see whether you have cut down on the length of time it takes to certify a firm. It should not take 6 to 9 months. That's unreasonable. I am going to have my staff look at the breakdown in terms of minority participation under the Surface Transportation Act and several other things of that nature.

Mr. NAIRNE. We will welcome you.

Mr. MITCHELL. Thank you for being here.

Our next witnesses are Percy L. Hines, special assistant to the Secretary of Transportation, and Jerry Blakemore, counsel to the Governor, Governor's Office of Interagency Cooperation.

Thank you for being here. We have received copies of your testimony. We will take a 10-minute break.

[A short recess was taken.]

Mr. MITCHELL. Thank you. We are ready to resume our hearing. Gentlemen, again my apologies. It was something I couldn't control. Will you proceed with your testimony? If you will highlight it, it would be most appreciated.

TESTIMONY OF PERCY L. HINES, SPECIAL ASSISTANT TO THE SECRETARY OF TRANSPORTATION, STATE OF ILLINOIS, ACCOMPANIED BY JERRY BLAKEMORE, COUNSEL TO THE GOVERNOR, GOVERNOR'S OFFICE OF INTERAGENCY COOPERATION

Mr. HINES. Thank you. Secretary Kramer wants to thank this committee and express his appreciation for the opportunity to comment on the implementation of section 105(f). To the chairman of the committee, Congressman Mitchell, and other members, particularly Congressman Savage and Congressman Hayes from Illinois, I want to thank you again for holding this hearing. We would also like to extend our thanks to Thelma Duggins of Federal Highway, as well as Mr. Mena for the efforts they have extended in assisting us in the implementation of this act.

Enactment of this provision in the 1982 Highway Act provided a significant opportunity for minority or disadvantaged businesses to increase their participation in the Nation's economy by requiring that at least 10 percent of all Federal transportation funds be expended for work performed by small business concerns only controlled by socially and economically disadvantaged individuals. Illinois has supported this mandate and has worked very, very hard in its implementation. The program is now underway and our accomplishments have been aided by a rather effective and comprehensive certification process that assures that only bonifide DBE's participate. That certification process has been criticized, and, yet, it has been the recipient of many accolades, and it has really provided us with the opportunity to provide legitimate DBE's entry into the program while at the same time it has allowed us to rid Illinois of certain front companies. That effort was expanded in the last year. We have gone through approximately 1 year of sending each and every applicant, for recertification or new applicant, through that extensive process. That process does include an onsite investigation if there is any question determined by the committee.

The process may take an average of 60 days, depending on the completeness of the application. We view this as not trying to force people out of the program, but to give an applicant the opportunity to participate because we need to increase the number of DBE's.

With the extraordinary effort that we have expended in that process, we looked at it to determine if it was counterproductive. However, in our assessment we did find that we had increased the number of DBE's in our program tremendously over 1983, while at the same time ridding ourselves of quite a number of front companies. Compliance procedures have fostered DBE participation while providing relief from unnecessary requirements which are enforced by monitoring commitments made by prime contractors and penalizing those who have failed either to comply or demonstrate a good faith effort. Even with those provisions, problems can arise in the implementation of the program if DBE's aren't able to obtain bonding, related technical and financial assistance, and other support services are not available, or if the DBE is not made aware of the opportunities offered by this program. The accomplishments of the Illinois program, in a large part, are due to its strong technical and support services and its system for informing DBE's of contracting opportunities. Obtaining bonding has generally not been a major problem for DBE subcontractors in Illinois. However, efforts are underway to study State bonding requirements in order to explore possible improvements. Based on our experience obtaining financial assistance through procurement of loans or lines of credit is and will continue to be a major problem. Efforts at the State and local level, be they public or private, are not sufficient to deal with this problem thus far. Additional Federal support is needed in this area. For example, we feel that consideration should be given to the establishment of a Federal loan guarantee program. We will continue to strive to maintain the gains that we have made and to further strengthen and improve our program. Again, we thank you for the opportunity to present this information to you.

[Mr. Kramer's prepared statement follows:]

PREPARED STATEMENT OF JOHN D. KRAMER, SECRETARY, ILLINOIS DEPARTMENT OF TRANSPORTATION

INTRODUCTION

As Secretary of the Illinois Department of Transportation, I want to express my appreciation for this opportunity to comment on the Implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982. To the Chairman of this Committee, Congressman Mitchell and the other members, particularly my fellow Illinoisans, Congressman Savage and Congressman Hayes, I thank you for holding this hearing. Your interest in following up on the Implementation of Section 105(f) through Disadvantage Business Enterprise (DBE) programs is gratifying. I feel honored to share with you Illinois' record.

Section 105(f) requires that at least 10 percent of all federal transportation funds be expended for work performed by "small business concerns owned and controlled by socially and economically disadvantaged individuals." This provision is a key element in our efforts to foster the full participation of DBE's in our nation's economy. Vigorous and full implementation of this provision is critical, for no other program in the transportation industry provides more opportunities for DBE's.

Illinois supported the provision when it was enacted. Since then, the state has made the commitment to full implementation. In fact, in Illinois we have extended the 10 percent goal to all transportation projects, including those funded exclusively with state dollars. On September 6, 1984, Governor Thompson signed into law an act establishing a goal of 10 percent minority and female participation in all state contracting. This includes all categories of state contracting (commodities and equipment, professional services and construction). In addition, this law includes separate goals for women and minorities.

In Illinois, the DBE program is now well underway. Its establishment has not been without struggles. The sudden increase to the 10 percent DBE participation required by the Highway Act of 1982 created strain. It placed a heavy burden on the DBE contractor and prime contractor community to catch up. Problems in obtaining financing and capitalization were intensified. The need for cooperation between the public and private sector became paramount.

The hard work and cooperation over the last two years is paying off. In federal FY 1983, Illinois expended a total of $454.7 million in federal highway funds. Of that amount, $27.8 million, or 6.11 percent translated into contracting opportunities for DBE's. In federal FY 1984, $70.4 million, or 12.27 percent of the total federal highway funds were expended for work performed by DBE's.

Below is a summary of our program in the areas identified by your committee and a discussion of some of the problems we have experienced in the course of implementing the program in Illinois.

ILLINOIS' CERTIFICATION PROCESS

The Illinois certification process is designed to assure that only bonafide disadvantaged businesses participate in the program. To date, 39 alleged DBE firms as well as 43 alleged women's business enterprise (WBE) firms have either been denied certification or re-certification because of their failure to establish that they were, in fact, disadvantaged businesses. Highlights of the certification process are:

- Applications are reviewed by a certification committee.

- If the Committee has questions, the Department investigates applicants to ensure that the information is accurate and current.

- Each certified DBE/WBE is certified annually in order to continue to participate in the program.

COMPLIANCE WITH SECTION 105(f) AND DBE PARTICIPATION

DEB participation and compliance with Section 105(f) go hand-in-hand. Illinois, which has aggressively pursued both, has been aided by the following elements in its program.

Program Elements

IDOT has instituted special provisions for DBE utilization and increases in percentages of contracts requiring DBE goals. These provisions, applicable to all districts within the state, establish goals for DBE participation and penalties for failure to comply.

Illinois' program, approved by Federal Highway Administration (FHWA), contains a Special Provision for DBE participation which requires in Section III-E3 "That the bidder negotiated in good faith with the potential DBE by not imposing any conditions which are not normally imposed on all other subcontractors or by denying benefits ordinarily conferred on subcontractors for the type of work in which bids are being solicited."

This provides relief from the imposition of bonding requirements on DBE subcontractors by the prime contractor and the denial of a subcontract because of the inability of the DBE to provide same. It has been our experience that when primes require bonding of the DBE subcontractors, they inform the DBE in advance, and in many instances they allow the subcontractor to be bonded under the prime's bond with the DBE subcontractor paying its share of the pro rata premium cost. We have not received any complaints from our DBE contractor community about this procedure.

Each project containing a DBE goal, must include a completed utilization plan which is to be signed by the prime contractor and the DBE subcontractor and includes the project information, scope/quantity of work and the total price for those subcontracting services. This plan also includes the prime contractor's commitment to meet the goal. No award will be made for failure to submit the plan or to provide documentation for good faith effort.

The final enforcement mechanism to ensure DBE participation and compliance is exercised in the review of documentation submitted with the final request for payment. Disbursement of the entire contract balance is contingent on the DBE Liaison Officer's finding that the prime contractor either has complied with the Special Provision for DBE participation or has not met the DBE goal but submitted documentation which exhibits good faith effort.

To monitor and access information relating to DBE commitments and the amount of dollars actually earned by the DBE subcontractor, our computer system tracks the original commitment, flow of work performed, and the dollars paid. If there are any discrepancies between the state's records and the signed statements by a DBE and a prime contractor, a personal contact and/or documentation review is performed to verify the data submitted.

PROBLEM AREAS

This committee has identified several areas which are potential problems in the full implementation of Section 105(f). Below is a discussion of how these are addressed by Illinois.

Bonding

A critical area for DBE development and expansion is bonding. As pointed out earlier, Illinois' plan has specific provisions which prohibit a prime contractor from "imposing any conditions which are not normally imposed on all other subcontractors."

Although based on our experience, obtaining bonding has generally not been a major problem for DBE's, there are occasions when it can be an obstacle. To address this problem, the newly created Minority and Female Business Enterprise Council has been asked to examine state bonding requirement and report to the Governor. We anticipate the council's report within a year.

Technical, Financial and other Supportive Assistance

In federal Fiscal Year 1984, IDOT entered into consultant contractor arrangements with four management and technical consulting services on a statewide basis. The total of the consultant awards to the above four groups was $695,783. The sum of $652,553 was provided under the Surface Transportation Assistance Act with the balance of $43,230 being provided by IDOT. We developed a close relationship between two of the above firms and the Program Management Center (PMS). The management consultant was successful in acquiring 17 loan approvals amounting to $1.4 million for DBE contractors.

We have received several comments about problems with the federally sponsored Atlantic National Bank program. The problems appear to be primarily due to the lengthy turn-around period for loan approvals (two to three months) and the reluctance of many of the local banks to participate. This presents a serious impediment to the timely performance of DBE subcontractors. Financing has been and continues to be a major problem. Without additional federal support, efforts at the state and local level from public and private sectors are not sufficient to deal with the problem. While additional resources in the community are needed, some consideration should be given at the federal level to a loan guarantee program to supplement local efforts.

Efforts to Inform DBE's of Contracting Opportunities

The Illinois certified DBE community is well informed about our contracting opportunities as all certified DBE's receive a free Service Bulletin approximately four weeks prior to the lettings. Certified DBE's also receive any Supplemental Bulletins when issued, and these are also distributed to minority contractor associations, interested private industry companies which have minority utilization programs, interested community organizations and IDOT supportive service consultants. This distribution not only reaches the minority community statewide but also serves as an outreach tool to be used by community organizations to encourage additional DBE participation.

CONCLUSION

Our experience in Illinois has not been without problems but we will continue to strive to maintain the gains we have made and to further strengthen and improve the program. As mentioned earlier, financing opportunities must be improved in order to make the DBE program work. In this area, federal support is both welcome and needed.

Once again, thank you for your interest in this important issue and for providing this opportunity to present Illinois' story.

Mr. **Mitchell**. I thank you for being here. I am going to defer to Congressman Hayes who has spent quite a bit of time working on this problem with the State of Illinois. I am aware of the legal action that was instituted by the five contractors of Illinois alleging noncompliance with the Federal law on State DOT projects. The president of our minority business enterprise legal defense and education fund, Mr. Robinson, has been in contact with those contractors mainly to pursue further legal action.

Congressman Hayes.

Mr. **Hayes**. Thank you, Mr. Chairman. This is of deep concern to most of our small disadvantaged businesses, some of which folded in the State of Illinois. They might have been saved had we been able to be more successful in getting surface transportation contracts for them.

I do have a series of questions which address themselves to the issue. What assistance does our State offer to DBE's to help them overcome such barriers as bonding licenses, and prequalifications? Do we have any specific programs that might be of help to them?

Mr. **Hines**. First of all, in terms of a bonding issue, we have a department regulation that states that no prime contractor can impose a bonding requirement on a DBE subcontractor and in fact deny him that contract award if that is not his standard business practice. If it is his standard business practice to require bonding of all subcontractors, then it is incumbent upon him to find a DBE that can meet that bonding requirement. That's in the areas of subcontracting bonding. Our prime contractors are still required to meet the same bonding standards as any other prequalified contractor for DOT performance.

Mr. **Hayes**. We do have difficulties with some obtaining licenses. That has been expressed to me.

Mr. **Hines**. The Illinois Department of Transportation is not requiring licensing. The licensing principally is a requirement of the city of Chicago.

Mr. **Hayes**. But the State doesn't?

Mr. **Hines**. The State does not require that.

Mr. HAYES. What kind of technical, financial and other supportive assistance is available to disadvantaged business enterprises in our State that would assist new and existing minority businesses?

Mr. HINES. We currently have four consulting contracts for approximately $665,000 whose sole responsibility is to provide technical and managerial assistance to new and existing DBE contractors. That program has been in existence for some years now, and we just increased the dollar amount on that in 1983, and we are increasing it in 1984. That assistance is provided on a one-on-one basis, in some cases seminars and in certain areas under private programs. We do have educational training programs in cooperation with Southern Illinois University.

In terms of financing, we have held several seminars. We have been in constant communication with the Small Business Administration and the Department of Commerce and Community Affairs of the State of Illinois, as well as with the Atlantic National Bank which is a program supported by U.S. DOT.

We have been successful, or rather our support services have been successful, in obtaining I think 14 loans for several million dollars, and from the Atlantic National Bank they have been successful in awarding one loan which was $26,000 on a line of credit to DBE.

We have had a conference in Chicago dealing with the Atlantic National Banks Program, and we invited all the major banking institutions in the Chicago area, both minority and majority banks, to participate in that conference. The presentation in my view was an excellent one and I thought the program was at least better than anything in place. One of the major obstacles we encountered was that several DBE's, along with the assistance of the Atlantic National Bank, had visited major banks downtown and community banks, and those community banks just refused to participate in that program. The Atlantic National Bank Program allows any banking institution to participate into 5 to 20 percent of that loan, and that loan is guaranteed by DOT, and that effort is still in place. Activity is still going forward, but we have just not been that successful in that area. I have spoken to DOT officials about this issue and at the time this act was passed there has not been to my knowledge, any ongoing dialog or continuation of encouragement by the Department or Congress itself to get the financial institutions involved in this process. When you talk about $7 billion or more dollars, you are going to need that financing to undergird that, and that has been a major problem. Many of our subcontractors have received their capital as a result of the prime contractors making their payrolls and so forth. In some cases they have made arrangements where they pay the normal rate for loans that the prime would pay and that has been rather satisfactory in our experience. That is about all I know of at this point.

To address the licensing area, Congressman, and that has not been a major problem because we do not require that. Very few municipalities or cities outside of Chicago exercise that requirement.

Mr. HAYES. I note, and I am sure you have noticed this, too, that Illinois in fiscal 1983 met only 6.11 percent of the requirement by law that not less than 10 percent be set-aside moneys.

Now, do you think there could be some strengthening in this whole area? Is the lack of a financing program been a contributing factor in this?

Mr. Hines. My observation in the 16 months that I have been with the Department, and if you will, with all due respect, there was a 10-percent requirement in the Surface Transportation Act at the direction of the Federal Highway Administration that was averaged out and came to 8.3. Illinois in fact only made 6.11 in 1983. However, when I came onboard it was the intent of the Secretary and myself to begin to look at this program to develop a cooperative spirit between the minorities and the nonminorities and we spent some 2½ to 3 months trying to get some kind of a program that would be acceptable to the majority of those entities so that we could in fact come up with a credible program and begin to address the issue of front companies and the failure of prime contractors not to adhere to the regulations.

We then established a process so that we could meet the 10-percent statewide goal for 1984. We assigned heavier goals in the larger urban areas, and lesser goals in those areas that did not contain a large number of DBE contractors. The goal in the Chicago area was 15 percent, and the goal in the entire Chicago land area was 13 percent, whereas in smaller cities we had maybe a 3-percent goal. In 1984, I believe the statistics will show that we have achieved a 12.27 percent goal of all Federal dollars.

Mr. Mitchell. Would the gentleman yield?

Mr. Hayes. Happy to yield.

Mr. Mitchell. You have to understand, after being in Congress ~~this lo~~ng I've gotten old and irascible and cynical. We have a law passed by the Congress and signed by the President. You have the regulations promulgated by the Department of Transportation. What in the world would take you so long to follow the law of the regulations? You said you spent 3 months doing something. Everybody knows how I feel about seminars. I am sick and tired of these coffee and donut things in the morning; however, there may be some good seminars, but I haven't been to many of them. I am just curious as to why, with the law in place and with the regulations finalized, it would take that length of time to do anything?

Mr. Hines. The implementation process was not there on the part of the State of Illinois at that time. It was being developed and it took us that long to get it in place.

Mr. Mitchell. How long was that?

Mr. Hines. That was probably mid-1983. If I am correct, I think the first notice came to the Department in February 1983.

Mr. Mitchell. Thank you.

Mr. Hines. I came here in May.

Mr. Mitchell. For all the witnesses, I love everybody. I'm not angry with anybody except one or two people in high places, but it is just a matter of getting accurate information. I won't interrupt you again.

Mr. Hayes. I don't mind being interrupted because I want to pursue this question of financing a little more. I know you heard testimony from our two gentlemen from Maryland, and I'm wondering why our State cannot institute a financial assistance program to get the cooperation out of the banks to help these disadvantaged business enterprises that are struggling so hard and trying to survive and at the same time provide jobs. Is there any particular reason why?

Mr. **Hines**. Not that I would know of. We have talked to the State treasurer's office. We are still in the process of trying to address this issue, but we have nothing concrete at this point.

Mr. **Hayes**. Is there any specific plan you might have that we might be able to assist you with?

Mr. **Blakemore**. With the chairman's indulgence, I would like to respond to that question. My name is Jerry Blakemore, legal counsel to the Governor. There is a plan that has been put into place still with many other questions which relates specifically to the Surface Transportation Act. The Governor, on September 6, signed a Minority and Female Business Enterprise Act, which, as it relates to the Surface Transportation Act, takes care of a couple of questions that have been asked previously. One is the issue of set asides. The act specific authorizes the use of set asides, and that act will be very instrumental. It will be critical in Illinois' efforts to reach and possible exceed the goals that have been established, the 10-percent goal.

Those kinds of procedures, that kind of legislation, which I talked to the chairman about in Wisconsin 2 years ago when he first introduced this, do take time. That is one of the things that has been done now. That council will be composed of representatives of both the minority and female business community as well as State directors, and one of their charges is to examine the bonding requirements of the State of Illinois, and to provide recommendations on financing. The Department of Commerce and Community Affairs has a financing program as well as the Illinois Development Finance Authority. We will use those two agencies to assist transportation in its effort to increase capital for minority-owned firms. That is legislation that has just recently been signed and will provide us the authorization to address the concerns that you just raised.

Mr. **Hayes**. Would it be logical, in view of the success that the State of Maryland is having with its financing arrangements, to discuss with the Governor an inclusion of that kind of program as a specific means?

Mr. **Blakemore**. At this same conference that I discussed our legislation with Congressman Mitchell I actually had the opportunity to sit down with the director of the Maryland program. Their legislation was drawn upon largely for our legislation. We will continue those discussions and see to it that we sit down with them and discuss that issue specifically.

We have a council now with professional staff who mandated this with just those concerns. So it will be carried out by that council.

Mr. **Hayes**. I want to commend Governor Thompson for his enactment of the law ordering a set-aside of 15 percent. I do wonder, what program are you planning that will duplicate this 15 percent under the Surface Transportation Assistance Act?

Mr. **Blakemore**. It is not our effort to duplicate the efforts made under the Surface Transportation Act. The State law will assist the State in reaching the Federal goals that are established by the Surface Transportation Act. The issue of whether we are talking about a goal or set aside is one that is addressed in Illinois because we have the statute in place to administer a set aside program. Moreover, we have in place a council that can look at certification procedures and certify minority businesses across the board in all categories of State contracting. So we feel that we address that question and it is not a duplication at all. In fact, a big part of our overall goal for all the State contracting, which is 10 percent, will be in the area of transportation.

Mr. Hayes. Will this 15 percent then carry over into the State Surface Transportation Act?

Mr. Blakemore. We have extended the 10-percent requirement that is required under the Surface Transportation Act to all State funded projects as well in the transportation area. So it is that requirement that is extended to State from the contracts as well.

Mr. Hines. That has been in place since 1983.

Mr. Hayes. I am a little mystified. I'd like to know how our State, in specific terms, inform disadvantaged businesses about contracting opportunities, both prime and sub?

Mr. Hines. We have approximately 10 bid lettings per year. Four to six weeks prior to that bid letting we have established a process where each DBE certified on that list receives a copy of that service bulletin at no cost and also receives any additional supplemental information. So each certified DBE gets a copy of every project that is going to be let in the State.

In addition, we also send that service bulletin to all of our congressional Representatives, all of our State Representatives, as well as to our local community organizations, minority contractor associations, and other private sector corporations that have minority programs so we have a very cooperative effort.

As a result of that, it not only serves as an information tool, but it also serves as an outreach for encouraging other DBE's to become acquainted with the program. To support that we have, in our major urban areas, preletting means where we have all the plans and specifications there, with our supportive services and our own engineering personnel present. The DBE's are invited and if there are any questions, they go over those plans and specifications and attempt to explain them to them. That has been a very effective tool that we use in terms of supporting it, and it is an educational process as well.

Mr. Hayes. Do you have any enforcement mechanisms in place that are used to ensure that prime contractors use the disadvantaged enterprises?

Mr. Hines. Yes. In the past probably 10 months ago, we instituted a utilization plan, and contained in that plan were requirements for the prime and for the DBE. First of all, the prime indicates whether he or she intends to meet or not meet the goal. Attached to that is a participation statement which indicates the amount of work, the type and scope of work, and the dollar amount of work to be performed by that DBE. That is our commitment utilization form. The prime signs it and the DBE signs it, and we in fact hold that prime to that commitment to that DBE as a result of that submission of that statement.

Now, further enforcement comes about when final payment is requested. A prime contractor is unable to receive his final payment if in fact he has not held to the goal establishing that commitment, or has not been able to prove good faith efforts. In many instances, the State may reduce the quantities of work that have been performed. We have been working on that issue and are trying to make sure that those quantities are not reduced in the areas in which the DBE is performing. If that prime has not met that goal in terms of the dollars, and we do not take the prime's word for it, the DBE must submit a letter signed on its own stationery indicating the total amount of dollars that have been earned on that project. So those enforcement mechanisms seem to be working rather well at this point.

Mr. HAYES. Do you have any requirement where the DBE's and the prime contractors are brought together so they can get some collective understanding as to how these requirements, in terms of the program, ought to be fulfilled?

Mr. HINES. Absolutely. We have a DBE advisory council that is composed of members from the minority and nonminority community, and we have representatives from across the State sitting on that council. That council was put together I believe in the first part of this year. It meets on a quarterly basis with a specific agenda. At the conclusion of each meeting they make recommendations on the items that they would choose to discuss at future meetings. So that has been very effective, and in fact is a support arm to the implementation program.

Mr. HAYES. In order to share some time with my colleague who has just arrived from Illinois I want to ask one final question: What is the average length of our State certification process? How long does it take?

Mr. HINES. If an application is full and complete, it can be certified, depending upon the backlog, in a 30-day period. We have revised that application probably three times in the last 12 months trying to make it more simple in 1984.

Mr. HAYES. You don't have a number, even an estimated number, of front companies that we have encountered?

Mr. HINES. Other than the statistics that we have here, we take the posture that when we deny recertification, or deny certification, that we must have factual information because we have had several court suits that we have won, and we want to make sure that when we make those allegations that in fact our assessment is true because it is not proper to deny an individual, based upon a subjective evaluation, the right to participate in this program.

Mr. HAYES. Do you have any notion as to when this backlog is going to be cleared up?

Mr. HINES. We had anticipated that after our 1 year process of comprehensive certification that it would decrease, but it hasn't, and we are constantly getting new firms applying. So that effort is probably going to remain constant in that area. We have now created a new form titled, "Recertification," which is only two pages since we have all the documentation from the previous year, and we hope that is going to expedite this process.

Mr. HAYES. Are you short staffed?

Mr. **Hines**. I would say that probably every entity understandable, trying to expedite the process because 70 percent of the applications come in incomplete. We've had tremendous problems with that issue and we are trying to improve that, but many DBE's feel because they have been on the list for 4 or 5 years, that they don't have to submit anything and they just refuse to submit it. We've introduced assistance by supportive services in developing that process. We call them. We request additional information when it is not complete. Initially we allow them whatever time they want to submit that information. Now we have a time limit. You are deficient in the following areas. You must submit the information. We feel that this process has been very beneficial to the Department and to the program in terms of ferreting out front companies.

Mr. **Hayes**. We do have some front companies?

Mr. **Hines**. In the last year from October 1983, we had denied 20 DBE's that applied for recertification, and 47 new applications that applied for certification. So in essence, out of that number we had not recertified 20 of those firms. We are constantly getting applications. We carry about a 200-application backlog, and we process approximately 50 per month. So even with our efforts of removing the front companies, we have increased the number of DBE's and WBE's participating between 1983 and that comes here today, yes.

Mr. **Mitchell**. While Congressman Savage is getting ready.

First of all, I want to commend your Governor for what he said about this program. He made a public announcement that Illinois is meeting its goal and exceeding it. That's very good.

Of the 45.2-percent bid, how much did American Indians get?

Mr. **Hines**. In 1984?

Mr. **Mitchell**. Yes, that is what we are talking about.

Mr. **Hines**. Off the top of my head, because I prepared this, about 6 percent. It is running about 70 percent black; 20 percent Hispanic; 20 percent Asian; and about 7 percent American natives.

Mr. **Mitchell**. The second question is with reference to the $45.2 million that went to minority businesses in 1984, was that all contract, all award money? Did you count any commitments?

Mr. **Hines**. We followed the standard practice. That is commitments and awards. I heard your comments earlier.

Mr. **Mitchell**. It drives me right up the wall. You can't do that. Businesses don't operate like that. Please, I urge you to end that business of counting commitments. It gives a very distorted picture of what you are doing.

Do you think you might end counting commitments?

Mr. **Hines**. We are looking at that very seriously. Now, I do have statistics on the amount of prime contract awards, but that is only a part of the entire picture. It does not address the issue you are concerned about.

Mr. **Mitchell**. Two last quick questions. What is wrong with the black contractors of Illinois? Are they just mean troublemaking people? Why would they take you to court if all these good things are going on? If they are getting their fair share, what is wrong with them?

Mr. **Blakemore**. As the attorney for the Governor on that particular case, I would say we could not comment on that. Let me say this, however. I have, as a member of the Governor's staff, as well as personally have had several meetings with representatives of that organization. The Black Contractors United supported the Governor's effort in the minority female business legislation.

Mr. MITCHELL. They are nice people really if they supported that effort. What would make them so contrary to go after you? Is the matter still in litigation?

Mr HINES. Yes, it is.

Mr. MITCHELL. Don't comment then.

Mr. HINES. It is still in the U.S. district court.

Mr. MITCHELL. The last question. In 1980, the Department of Transportation enacted legislation requiring all the States to establish goals for the utilization of minority businesses. That was before the Surface Transportation Act. Did Illinois comply with that?

Mr. HINES. I can't comment on it. I don't have the statistics with me. They did comply with the intent. Now, whether they met the goal or not, I don't know. I do know it was close, but I don't know if they met it. They did establish goals, yes.

Mr. MITCHELL. My point is that these were pretty much the same requirements as the Surface Transportation Act, and I come back to my original question. If you complied in 1980, what in the world took you so long to get set up for the Surface Transportation Act? You would have established it.

Mr. HINES. Let me address that. In 1980, under that voluntary goal, or whatever it was they asked, because I am not familiar with all the goals we established in certain contracts, and they were selected depending upon the geographic area and the ability of DBE community to perform that. So with the advent of the Surface Transportation Act and the mandated requirement to escalate that, it took time to develop the administrative process.

Mr. BLAKEMORE. I might add that in prior to the Surface Transportation Act, Illinois minority business participation on a voluntary basis was around 3 percent, so we have obviously significantly increased that, and even though there were mechanisms in place, they had no place close to the force and effect of a Surface Transportation Act.

Mr. MITCHELL. Thank you. I won't raise any further questions because we have four more panels. Congressman Savage, who has worked very closely in Illinois on this program obviously has some questions.

Let me congratulate you for all the work you have done in your State regarding the implementation of this law.

Mr. SAVAGE. Thank you, Mr. Chairman.

We are having a little problem concerning legislation to legalize heroin for the use of terminally ill cancer patients which is a concern of mine. So I apologize to you personally for not hearing your original presentation. Also, let me apologize if I ask questions that bear a bit on questions that have already been asked before I arrived.

Let me first ask you, what are the two most serious problems that you have run into in trying to comply with the set aside in response to some of the complaints you have received from minority contractors?

Mr. HINES. Probably the most significant one is cash flow, then lack of financing, and lack of sensitivity on the part of the financial institutions.

Second, one of the major problems that I found, and we are trying to address this on a regular basis, is that many of the DBE's come into the program without having read the regulations, without having proper guidance in terms of completion of the application. Even though we send out an application and identify the support services that are there to assist them in that, they tend to be very self-sustaining and provincial and go ahead and do it.

Another problem, but not a major one at this point—is the Illinois Department of Transportation does not have any relationship with subcontractors. A huge percentage of DBE's in Illinois are subcontractors, and there have been some significant problems in terms of a prime not paying a DBE on time.

Mr. SAVAGE. I wanted to get to that because my office has received those type complaints from contractors. What, then, are you doing in response to your recognition of these problems? Take the cash-flow second. Well, the cash-flow actually relates to the second thing you raised, the question of slow payment.

Mr. HINES. If we look at the some 933 commitments that we had during the course of 1984, we may have had two or three complaints about primes not paying on time. Of course, that is significant to that one individual, so we can't deny that. We do assist them letting them know whether the prime has been paid, and if the prime has been paid we get on the telephone and we instruct them to go ahead and pay that DBE. But during that interim period we have to first determine from our field personnel whether that work was actually completed. We have had some DBE's that have requested false payments, but I know what you are addressing: The slow payment.

Mr. SAVAGE. I am not asking you how you are addressing those who have not completed work. Apparently, our office has received complaints about slow and nonpayment more often than your office has. I am asking about those DBE's who completed the work, but their payment has been unreasonably delayed—something which contributes to the problem of cash-flow. What are you doing in response to that?

Mr. HINES. We are responding to it if we know about it.

Mr. SAVAGE. In what way?

Mr. HINES. We call them and we make sure that prime pays those people.

Mr. SAVAGE. How do you make sure?

Mr. HINES. We lean on them, if you want to use it in the——

Mr. SAVAGE. What does that mean, lean?

Mr. HINES. We encourage him to meet the regulations and participate in this program.

Mr. BLAKEMORE. The regulations require that before a prime contractor is paid, the EEO officer who sits on the certification committee has to certify that this prime contractor has in fact utilized the minority representation. That was part of the provision of the contract, because the State holds that payment and it is the Governor who instructs the controller to make a payment that comes from the Department of Transportation.

Mr. SAVAGE. Let me interrupt you. I don't know how familiar you are with the practices of the construction industry. I think, Percy, you are fully aware that subcontractors are so happy and anxious to get their subcontracts that they often sign waivers in advance.

Mr. HINES. We don't require waivers.

Mr. SAVAGE. Let me give you an example. Here is a case of Berrara Trucking Co.

Mr. HINES. We can't discuss Berrara Trucking because that is part of that litigation.

Mr. SAVAGE. The fact that there is such litigation pending in the case indicates there is a real problem. The problem being the relationship of the subcontractors to the prime contractors in our State where the subcontractors are literally at their mercy. They are not in a position to contest false evidence of payment when they are not being paid. We receive such complaints in our office, and I am asking again because I am still not clear on what your answer was, other than this vague thing about leaning on and all this paperwork and all this other bureaucratic procedures and so forth that you have already admitted fails. Since you pointed out that the minority contractors can't even qualify because there is so much paperwork that they have to fill out, what are you doing to effectively speed up payment to the minority contractors. And what are you also doing to help create a realistic situation in terms of financing since you know they have banking problems? The banks discriminate against minority contractors also. You have underfinanced businesses for all kinds of reasons. SBA and so forth is being cut back by the Reagan administration, so you understand the reality of life among minority contractors. Since you brought that familiarity into your position, what have you contributed specifically to remedy it? Other than that bureaucratic paper and applications and certifications and all that kind of stuff, what are you doing?

Mr. HINES. I can address this. In those several cases that I have become acquainted with in terms of slow payment during the project or after the project, no prime gets paid until the DBE has certified the dollars to the dollars earned——

Mr. SAVAGE. That is not working as you would like it to work.

Mr. HINES. Nothing is working like I would like it to work.

Mr. SAVAGE. What are you doing to make it improve?

Mr. HINES. I personally got on the phone, and I have specific cases, and out of 933 commitments I haven't had 5, and I have indicated to that prime contractor that he would be best served to go ahead and pay that DBE.

Mr. SAVAGE. Let me ask you this. The next time a contractor, subcontractor calls my office and complains of a delay in payment, if he can evidence to you that he has satisfactorily completed the work, how many days would you consider to be unreasonable?

Mr. HINES. I would consider an excess of 30 days.

Mr. SAVAGE. The next time a subcontractor complains to my office that he has not been paid in 30 days and completed the work, can I send him to you?

Mr. HINES. Sure you can.

Mr. SAVAGE. How long after that can you assure me that he will be paid?

Mr. HINES. I can't assure you, but I will assure you that I will take care of——

Mr. SAVAGE. You just told me that leaning works. Now you are telling me it doesn't work.

Mr. HINES. Congressman, each case is different.

Mr. SAVAGE. How different can it be? I just said if the subcontractor had completed the work and hasn't been paid in 30 days, how long does it take you to do that leaning business to get him paid if I bring him to you?

Mr. HINES. He has not been paid in 30 days and all the situations are in place as you stipulated.

Mr. SAVAGE. There are two things. He hasn't been paid in 30 days and he has completed the job.

Mr. HINES. I will exercise my right or my ability to get him paid immediately. It depends upon his subcontract arrangement. It depends upon whether he has any back charges.

Mr. SAVAGE. You see, when I raised the problem with you, you said that you work it out because you are leaning. I begin to get more specific and you begin to run all over the place. You lose me let alone a poor subcontractor. How long, if I bring him to you, can you guarantee he is going to get paid?

Mr. HINES. I am not going to give you any stipulated dates on that.

Mr. SAVAGE. Here is another problem, then. Incidentally, that is the problem they bring me, too, that when they go to you and go to your agency, they get the same kind of run around.

Let me ask you another one. We were just talking about minority firms in the construction field, and you know this field is filled with a history of problems in our State because of discrimination. However, the 10-percent set-aside requirement is not restricted to contractors—I mean to construction firms. Earlier you were asked how are you getting the word out to minority firms about how to bid and so forth? Well, if you placed advertising in minority communication companies, that would apply toward your 10-percent set-aside, would it not?

Mr. HINES. If it is on a construction project. If it is not on a construction project——

Mr. SAVAGE. I am only talking about your construction project.

Mr. HINES. We don't have any advertising contracts on construction projects.

Mr. SAVAGE. Maybe that is part of the reason you are not reaching enough minority or potential minority subcontractors. Wouldn't it pay you to publicize your program?

Mr. HINES. In my opinion, I think it is well publicized now at no cost to anyone, and we don't have any advertising needs.

Mr. SAVAGE. You mean you have more qualified DBE's than you need?

Mr. HINES. We are meeting our goal.

Mr. SAVAGE. You are meeting your goal? But there is a question as to whether you are meeting your goal on paper, or whether you have in place a program sufficient to investigate to find out whether you are meeting your goal in actuality. There is a big difference between what a prime contractor may tell you, as you will find out in the Berrara case, and what the prime contractor actually does because of the reality and the relationship between minorities and prime, and you are aware of this. You were aware of this before you went to work for the State. Have you lost that knowledge since you got there?

Mr. Hines. I think it has improved tremendously, Congressman, in terms of this implementation. I think it is 50 to 75 percent better than it was 2 years ago.

Mr. Savage. What about in the use of accountants or lawyers?

Mr. Mitchell. May I interrupt my colleague for just a moment? There are four more panels, so if you could make this your last question for now, then maybe we can come back. There are three or four more panels waiting.

Mr. Savage. Very good.

We talked with the Black Accountant Association. They said they know of no black firm with a contract with the Department of Transportation. We talked to the Cook County Bar Association. That is the bar association of minority lawyers. They know of no firm with a contract with you. We talked to the advertising agencies. The only one we could find that has any kind of an account with you is Vince Culler's Advertising Agency and they only have $7,000 and that's not anything. Then we talked to the newspaper. The only minority owned newspaper we could find that had any advertising from you was the Chicago Defender, and they said they only get $70 every 90 days, and William Garth, who is the supervisor of advertising for all the minority newspapers, the National Newspaper Publishers Association, say that is the only one he knows of receiving anything.

Why wouldn't you try to use more than just contractors since more than just contractors are involved in the transportation program?

Mr. Hines. Maybe you didn't hear this when we addressed our system of disseminating information to minorities. We have a service bulletin and it is published in-house for every bid letting, and that goes out to the entire minority community and certified contractors, so there is no need for advertising at that point. I know about the Vince Culler's contract. That was last year. That is the only advertising that I know that we have done at this point relative to this program.

Mr. Savage. Thank you, Mr. Chairman.

Mr. Mitchell. Thank you very much. Thank you, gentlemen. It is good to see you again.

We will move as quickly as we can to the South Carolina Department of Transportation. Will that panel come forward? While that panel is coming foward, again let me express my pleasure with the actions taken by Gov. Dick Riley in South Carolina. Immediately after the law was passed we moved around to meet the various Governors, and Governor Riley was, again, one of the first 30 Governors to come out and say we are going to meet our goal. I congratulated him when he did that, and if you would again convey my thanks to him for the very positive position that he took on this issue.

Gentlemen, we have your testimony. You may proceed as you so desire. I simply ask that you try to summarize and give us the major points in your testimony. Thank you very much for being here. I thank you for your patience in waiting.

TESTIMONY OF JOHN W. GADSON, SR., DIRECTOR, GOVERNOR'S OFFICE OF SMALL AND MINORITY BUSINESS ASSISTANCE, STATE OF SOUTH CAROLINA, ACCOMPANIED BY BENJAMIN BYRD, EQUAL EMPLOYMENT OPPORTUNITY OFFICER; VIC EVANS, CHIEF LEGAL COUNSEL; AND WILLIAM FLETCHER, DIRECTOR OF CONSTRUCTION

Mr. **Gadson**. Thank you. Immediately upon receiving your letter, we called back to your office to say that Governor Riley had a previous engagement and could not make it, but he would provide a delegation from his office and the South Carolina Department of Highways and Public Transportation to answer your questions.

Mr. **Mitchell**. That is very generous. Maybe he didn't need to send the whole delegation, but there are a lot of men in South Carolina from the department of transportation.

Mr. **Gadson**. The testimony you received is actually the Governor's testimony, and I am here to offer that to the record. Along with us in the delegation, I want to introduce several persons. Ms. Karla Schroder is also from the Governor's office on the staff of the office of minority business; Commissioner Margaret Rush, who is one of the members of the governing board of the highway department, and Benjamin Byrd, our EEO officer for the highway department; Vic Evans, the chief legal counsel for the department of highway and transportation; William Fletcher, who replaced our chief engineer is director of construction. The chief engineer had a death in the family and could not come after we made the commitment.

Mr. **Mitchell**. Director of construction for the whole State?

Mr. **Gadson**. Yes. He is very familiar with the program.

The testimony that we provided you is a summary from the Governor, of information provided to him by the department of highways and public transportation. Governor Riley wanted us to especially convey to you his appreciation for the kinds of things you are doing in promoting minority business and wanted you to be aware that he is very much in favor of the activities that have taken place to develop minority businesses, and especially appreciates section 105(f) of the Surface Transportation Act.

Before answering specifically the questions in your letter, we also want to point out that in South Carolina we have a very strong legislature, and the programs of the State are carried out by approximately 100 independent State agencies of which the department of highways and public transportation is one. Therefore, the responsibility to administer the highway program in South Carolina lies with the independent State agency called the South Carolina Department of Highways and Public Transportation, and we have in our delegation today persons who are very much involved in the administering of the Surface Transportation Act in highway construction. Therefore, we can respond from a point of view of knowledge to the program.

Mr. **Mitchell**. Excuse me. You don't have a State department of transportation?

Mr. Gadson. We have a State department of transportation, but it is an agency operated like all agencies in South Carolina operated by a commission or a board of which they are appointed by the Governor and the legislature.

Mr. Mitchell. The only reason why I asked is, in almost every other State there is a State department of transportation which has the responsibility of implementing this, but yours is different.

Mr. Gadson. We are slightly different. We have a separate agency, for example, the highway and public transportation and aeronautics, they are independent agencies.

On page 4 of the Governor's testimony I want to point out a few special things. The second paragraph indicates that South Carolina Legislature passed this year in its appropriation act a special clause that supports the Surface Transportation Act, section 105(f) and actually mandate through a State law that the highway department strive, through various methods of contract regulations, to meet the goal. So not only do you have the Governor's support for section 105(f), we also have now the State legislature speaking out on the issue with the support and strong backing from the South Carolina Legislative Black Caucus, and we have a commitment from our new commissioner that this goal will be met, or the requirement in section 105(f) will be met.

On the issue of certification, our certification process follows very closely the outlines and mandates in the Federal Register of July 21, 1983. We will comment on that a little later if you have specific questions, but our certification process is right in line with what is handed down to us.

On page 5 of the testimony we talk about method of informing DBE's of opportunities. Our method is, every time the State decides to put a contract out to the primes, the minority DBE's are sent information concerning that particular project. We also urge contractors in looking for DBE's to advertise both in minority focus media as well as the in general circulated media in the State.

On page 6, the method to ensure compliance, and I will hit a few of the highlights. The State followed a process of rejecting all bids when the low bidder fails to meet or demonstrate a good faith effort to meet the goals established. During fiscal year 1983 and 1984, the South Carolina Department of Highways and Public Transportation rejected 17 contracts valued at $25.6 million in low bids. These rejected bids were from firms that did not meet the goal, or did not show good faith in attempting to reach the established goal. Upon reprocurement of these projects, prime contractors tended to comply with the goals established by the department.

Further, beginning in October, the department have now begin to implement regulation to move from the low bid who did not meet it, to the second low bid, and can also forfeit the bonds and can reject a person from bidding on future contracts.

In the area of technical assistance and support, through a supportive consultant, T.A. are provided to the DBE's as well as assistance to the prime in locating minority companies. Assistance is given in bid preparation, bonding and trying to locate financing for DBE's. Many of these areas are still a problem for us including bonding and financing. Expenditures on page 7 with DBE's and

WBE's, in 1983, $109.4 million was authorized for expenditures in the construction of highways. The goal for that year in South Carolina was 8.2 percent for DBE's, and 0.15 percent for WBE's. At the end of the fiscal year of 1983, we actually authorized to minority firms $6.8 million, or 6.2 percent. We fell short of our goal for 1982–83 by approximately 2 percent. However, in 1983–84, we had $101.2 million for construction as of July 24, 1984. The goal was 10 percent. The State actually authorized 15.1 percent during the period of time. The 15.1 percent represented a carry forward of goals not met in 1982–83.

Mr. MITCHELL. Excellent.

Mr. GADSON. As of July 24, we are at a commitment point of 9.6 percent of the goal of 10 percent for minorities.

Now, in light of a number of things happening in the State, there are several new thrusts coming along with a new commissioner and new commitment from the department of highways, there are several new things. One, we are in the process of reorganizing our civil rights compliance unit and upgrading the whole unit to deal with the civil rights compliance section within the department of highways and public transportation in a more comprehensive manner. This process has started. We visited the State of Maryland for 2 days and had the opportunity to go through their program with our chief commissioner, our chief highway engineer, and Mr. Byrd. I myself represented the Governor's office, and we are now in the process of taking ideas from the Maryland department to improve ours.

Also, in October we will begin to require quarterly reports on actual expenditures with minority firms from prime. Also in October, we are requiring the prime to put in writing subcontracts that they plan to let out 10 days prior to the letting and submit that information back to the Department. Then, we will, in turn, redistribute that information to the minorities through our supportive service contract and other means.

Again, in a brief way, the Governor is saying that he has a commitment to this process. He has established a buy and match type program for all State agencies, and has carried the 10-percent idea to other State agencies, as well, in South Carolina. Working with the new commissioner, Mr. Walker P. Ragin, we look forward to meeting the goal as outlined.

Questions in general about the State I will field, and those directed to the highway department will be fielded by Mr. Evans and the staff from the department of highways.

Mr. EVANS. Just to supplement Mr. Gadson's remark, he already said it very well, the highway department is committed to carry out this mandate. We feel that under the new chief commissioner and with the commission's cooperation, and with the legislative black caucus coordination which gave us the legislative authority to really make a very strong effort of compliance through contractual documents rather than having to go through the Administrative Procedure Act [APA]. South Carolina has an APA where you have to go through the general assembly, and you have to promulgate regulations, and they oftentimes get changed and sent back to you. Lobbyists get involved. Under the legislation we have this year, we now have the authority under the contract itself to impose whatever requirements we want to in order to carry out the mandates of the Surface Transportation Act.

Attached to our presentation is a copy of our special provisions and instructions to bidders which will be included in the October letting, and will be included in all subsequent lettings, which have very strong sanctions on a mandatory basis. Sanctions for violations of the act include disqualification from bidding and other suspension procedures. If they don't live up to the mandates, we can disqualify them, and that is very strong economic leverage against a contractor. There are also areas, potential withholding of moneys and things of that nature, that are all spelled out in the special provisions. We won't try to go into them, but the most important point is that this will be in the October letting. It was authorized by the general assembly after Mr. Ragin met with the black caucus, and they cooperated and we put this in the Senate finance version when it came out, and it was finally enacted into law by the Governor in July, which now gives us the authority under the contract documents to make sure the South Carolina Department of Highway and Public Transportation can carry out the statutory mandate.

One other point, to anticipate a question or two, South Carolina, through Mr. Byrd, does keep a breakdown of the DBE contracts by ethnic classification. Mr. Byrd has that with him today. We would be more than happy to supplement the record with that information.

As another point that I believe the chairman brought out on the matter of mentor-protege concepts, South Carolina does not now have that, but I thought the committee might be interested in a document that we received on the 1984 policy position on disadvantaged program issues, which was approved September 11, 1984, by the executive committee of the joint AASHTO-AGC-ARTBA, which seems to go into the matter of mentor-protege concepts. We would be more than happy to pass that up.

Mr. MITCHELL. Let's make sure that information is submitted for the record.

Mr. EVANS. We are not advocating it. We just thought since you brought it up you were interested in it.

Mr. MITCHELL. I want to know more about it. You can submit it for the record.

[Material referred to above follows:]

1984 POLICY POSITION ON DISADVANTAGED BUSINESS PROGRAM ISSUES

Approved September 11, 1984 by the Executive Committee
of the Joint AASHTO-AGC-ARTBA Committee

The AASHTO-AGC-ARTBA Joint Committee believes there is a need for innovative approaches to making the Disadvantaged Business Enterprise/Woman Business Enterprise (DBE/WBE) program operate successfully, along with a parallel need to prevent small, medium and specialty non-disadvantaged contractors from being displaced from the industry.

The highway construction industry, working cooperatively with the States and the Federal Highway Administration (FHWA), has endeavored to greatly increase DBE participation in the Federal-aid Highway Program as a result of the 1982 Surface Transportation Assistance Act (STAA). Nevertheless, the DBE/WBE program has been hampered by inadequate numbers and capacities of DBE/WBE firms. The Joint Committee believes that innovative methods, such as a mentor/protege concept, are needed to develop additional DBE/WBE capacity.

The Joint Committee recognizes that traditionally many prime contractors owe their success to the experience gained, often over an extended period of time, as a subcontractor/protege to a prime contractor. The Joint Committee believes this type of assistance is a common relationship in the industry between prime contractors and subcontractors, and DBE and WBE firms should not be deprived of the assistance and training now available to non-disadvantaged subcontractors.

The Joint Committee believes the mentor/protege concept, wherein the prime contractor is provided the flexibility, at its option, of providing needed financial, technical, managerial, training or other types of assistance to a DBE/WBE firm, offers possibilities for participation for DBE/WBEs in the highway construction program, which in many cases would never be realized without such assistance.

Accordingly, the Joint Committee calls upon FHWA to develop and distribute to the States and industry flexible guidelines describing acceptable relationships between prime contractors and new or developing DBE/WBE firms, and the types of assistance prime contractors may properly provide to such firms. In that the guidelines the Joint Committee is calling upon FHWA to develop are meant to be general and flexible in nature, the Joint Committee recommends that such guidelines not contain a requirement that a prime contractor must enter into a written contractual agreement with a DBE/WBE as a precondition to the provision of assistance to that firm. The Joint Committee believes flexible Federal mentor/protege guidelines are desirable in light of the difficulty of achieving established goals with existing and experienced DBE and WBE firms.

The Joint Committee emphasizes that a mentor/protege concept must not be a requirement of the States or of prime contractors. It should be an additional and optional tool, offered by FHWA, to assist the States and the industry in fulfilling the requirements of Section 105(f) of the 1982 STAA. The mentor/protege concept should be aimed and tailored to development of additonal DBE/WBE capacity in disciplines other than labor intensive areas, such as landscaping, in order to avoid further impact on existing firms in such areas.

The Joint Committee believes dissemination by FHWA of flexible mentor/protege guidelines will help to: 1) increase the number of qualifed DBEs and WBEs participating in the Federal-aid Highway Program; and 2) increase those firms' ability to compete in that program./

The Joint Committee continues to be concerned with some segments and impacts of the DBE/WBE program. One of those impacts is the loss of opportunity for existing small, medium and specialty non-disadvantaged contractors.

The Joint Committee believes the DBE/WBE program should be implemented on a well-defined good faith efforts basis in all states. The Joint Committee emphasizes, however, that a prime contractor's investigating or entering into a mentor/protege relationship must not be required by the States or FHWA in assessing the adequacy of that prime contractor's good faith efforts to meet a DBE or WBE contract goal.

Mr. EVANS. Other than that, I feel Mr. Gadson has pretty well covered all the remarks by Mr. Ragin. I thought he did a fine job.

Mr. MITCHELL. Some corporations in the private sector are doing very well in terms of making opportunities for minority businesses. They are in the small percentages. We have a very bad picture of the private sector, and I have become convinced over the past years that it is the degree of commitment at the top that makes it work. Based on what you have told me, there is a commitment on the part of Governor Riley, and I am assuming that that commitment is permeating through all the layers to make sure that this program works. He was unequivocal in his statement to the press when I was with him. It will work in my State.

You kind of fell down in 1983, didn't you? But that slack is to be carried over to 1984.

Mr. GADSON. Right.

Mr. MITCHELL. You are talking about reaching a goal of 12 point something in 1984, is that correct?

Mr. EVANS. Yes, sir.

Mr. BYRD. We don't have that information. You are talking about for the period of 1984 throughout until now?

Mr. MITCHELL. Until July 20.

Mr. BYRD. We don't have that information available right now. We will be glad to submit it.

Mr. MITCHELL. You've got to have it. We have a figure that 9.6 percent went to DBE's, so you must have known from what prime that came.

Mr. BYRD. I think the July figure of $98 million is the portion from the Federal Highway Administration.

Mr. GADSON. I think there is a matter of timing, sir, on when the report came and which figure was being used.

Mr. MITCHELL. I just finished praising you guys. Don't do this to me. Let me rephrase.

If you put out, let's say, $50 million up to July 20 of this year, it is $50 million from what size pie? You can't put a figure down there for minorities unless you know what was disbursed.

Mr. **Byrd.** In fiscal year 1983, approximately $109 million of the funds was obligated for contracts.

Mr. **Mitchell.** That is spelled out to 8.9 percent, or something around there for DBE's?

Mr. **Byrd.** DBE's have been authorized to do about 6.7 million dollars' worth of that work.

Mr. **Mitchell.** Evidently somebody has the figures a little mixed up, but it doesn't matter. Somewhere your records show there was 8.2 percent, but that is not the issue. The issue is how much was spent in this year up to July 20?

Mr. **Byrd.** In 1984, we authorized a total of 15 million dollars' worth of contracts, and that is based on $101 million that had been authorized by FHWA as of August 24. The $15 million figure is for the period to August 24 as well.

Mr. **Fletcher.** And that would be about 14 percent.

Mr. **Evans.** We would like to offer this as a supplement. This is the breakdown that we referred to earlier, and we will supplement the record with this.

Mr. **Mitchell.** That would be great if you would let me know what went out, total dollar volume, and total dollar volume to minorities and the percent.

Mr. **Evans.** It shows we have broken it from black, Indian, Asian, Hispanic. We've got all that breakdown on this chart here, and we can supplement the record.

After hearing the questions today, we realize that we should have.

[The material referred to above follows:]

NUMBER OF MBE-DBE/WBE PRIME AND SUB CONTRACT AWARDS/AUTHORIZATIONS BY ETHNIC GROUP

The South Carolina Department of Highways and Public Transportation recognizes the minority groups/individuals who are presumed to be socially and economically disadvantaged as owners of Disadvantaged Business Enterprise (DBE) firms and eligible to participate as such in our program.

The definitions that apply to program participants are as follows:

Socially and Economically Disadvantaged Individuals

Those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are:

(a) Black, a person having origins in any of the Black racial group of Africa;

(b) Hispanic, includes persons of Mexican, Puerto Rican, Cuban, Central or South America, or other Spanish culture or origin, regardless of race;

(c) Native Americans are persons who are American Indian, Eskimo, Aleut, or Native Hawaiians;

(d) Asian Pacific American, persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philipines, Samoa Guam, the U.S. Trust Territories of the Pacific and the Northern Marianas;

(e) Asian-Indian Americans, which include persons whose origins are from India, Pakistan, and Bangladesh;

(f) other groups or individuals, any other minorities or individuals found to be disadvantaged by the Small Business Administration under Section 8(a) of the Small Business Act and individuals determined to be socially and economically disadvantaged on a case-by-case basis by the Department, who are not members of one of the designated groups.

Disadvantaged Business (DBE)

A small business concern as defined under Section 3 of the Small Business Act and relevant regulations which is owned and controlled by one or more socially and economically disadvantaged individuals. Owned and controlled means a business, (a) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or in the case of any publicly owned

> business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals, and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

> Women Business Enterprise (WBE)

> A small business concern which is at least 51 percentum owned and controlled in both substance and form by one or more women and whose management and daily business operations are controlled by such individuals.

The DBE and WBE components of our program are separate and are not combined for reporting purposes. The totals for each of the DBE and WBE procurement activities should be measured by the total program procurement opportunities in order to determine the level of participation in relationship to the goal(s) established.

The attached charts will show the level of program participation by ethnic group. Women Businesses being reported consist of non-minority females only; therefore, no further breakdown is necessary by ethnic group.

1983

TOTALS	BLACK		INDIAN		ASIAN		HISPANIC		OTHERS		WBES	
	NO.	%	NO.	%	NO.	%	NO.	%	NO.	%	NO.	%
FIRMS 35	31	88.5	3	8.6	1	2.9					13	100
CONTRACTS 138	110	79.7	25	18.1	3	2.2					61	100
DOLLARS $6,790,365	4,715,521	69.4	1,837,460	27.1	237,384	3.5					1,541,621	100

1984

TOTALS	BLACK		INDIAN		ASIAN		HISPANIC		OTHERS		WBES	
	NO.	%	NO.	%	NO.	%	NO.	%	NO.	%	NO.	%
FIRMS 46	38	82.6	5	10.9	1	2.2	2	4.3			11	100
CONTRACTS 143	104	72.7	34	23.8	1	.7	4	2.8			3	100
DOLLARS $15,875,185	10,223,585	64.4	3,722,431	23.4	340,552	2.2	1,588,627	10			1,720,134	100

Mr. Mitchell. Let me ask two more quick questions. How long does your certification process take?

Mr. Byrd. It takes on the average of 3 months, or in some cases longer.

Mr. Mitchell. But on the average, is it 3 months?

Mr. Byrd. Yes. It depends on the completeness of the application that is submitted.

Mr. Mitchell. If you get a completed application perfectly filled out, what is the average length of time it takes to process it?

Mr. Byrd. We can certify the firm as such right away if the information is completed.

Mr. Mitchell. You don't have a situation like they have in New York where it can take from 6 to 9 months to become certified. You don't have that if it is a good application?

Mr. Byrd. If it is a good application, we wouldn't have that.

Mr. Mitchell. The last question I have is what do you count to arrive at the figure that represents the dollar volume that went to minority businesses in 1983 and 1984? Do you count awards or commitments or both?

Mr. Byrd. We are counting awards and are separating the two. We are counting commitments and awards, but we are separating the two. The report that will show the number of contracts that were awarded to minority firms by ethnic category will show actual awards to those firms.

Mr. Mitchell. Will you please give me the actual awards in 1983 and 1984, not commitments. You don't have to do it right now.

Mr. Byrd. This is the information we are going to submit as a supplement.

Mr. Mitchell. Didn't you know I was going to ask for that?

Mr. Byrd. Yes.

Mr. Mitchell. Why didn't you do it for me?

Mr. Byrd. It's done.

Mr. Evans. We didn't realize until we got up here that it was going to be quite that extensive. We also have a problem with the Federal Highway Administration. It speaks in terms of commitments. We have different reporting problems, but we understand where you are coming from.

Mr. Mitchell. Commitments cannot be counted in my book.

Second, what have you done to ensure that these goals or the amounts of the award are strictly under the Surface Transportation Act? Are you mixing in a little FAA stuff?

Mr. Evans. No, sir. We are strictly highway department, as Mr. Gadson pointed out. Our sole authority relates to highway construction.

Mr. Savage. Let me ask you, Mr. Gadson, do you have that problem that we were just discussing with the representatives from my State of Illinois, there being a difference between the total of the awards and the actual payments received by the DBE's?

Mr. Gadson. I would prefer one of the members of the highway department answer that question.

Mr. Evans. Are you talking about late payments?

Mr. Savage. No. I am going to ask you that, too, and you can address yourself to them both at the same time if you wish, but the problem of putting one figure in the contract for the DBE but in the actual pay becomes another. Do you understand? Do you have that problem?

Mr. **Evans**. No, we don't have that problem.

Mr. **Fletcher**. We have this quarterly report which the contractor has got to fill out, and he says what he pays his DBE for this quarterly period. Also I believe the DBE is also asked to sign this report so we will have factual information to rule on that he does pay his DBE the amount of money that he is suppose to on the contracts.

Mr. **Savage**. So you get both signatures?

Mr. **Fletcher**. Yes.

Mr. **Gadson**. As of this point we are not collecting the data after the fact. That is a new commitment that we are going into. We are getting the authorized figures but we are not collecting, we do not get the canceled checks and the report and the sign off now, but the highway department has made a commitment that beginning in October these new requirements are now going into the contract and we will start doing that.

Mr. **Savage**. You mentioned canceled checks?

Mr. **Gadson**. We won't go to the canceled checks, but there will be two requirements. The prime will have to do quarterly reports and actual dollars paid to minority companies, and the department will require documentation of the contractual arrangements between the prime and the DBE's so we can check it out.

Mr. **Evans**. We will have authority to audit under special provisions. We will be able to audit that on a spot audit basis. We feel like we have addressed that problem.

Mr. **Savage**. But you are aware of it?

Mr. **Evans**. Yes.

Mr. **Savage**. I would like the record to show, Mr. Chairman, the apparent contrast certainly at least in the attention to this problem, the effort to deal with it as expressed by the representatives here of South Carolina, as contrasted with the vague answers from the representatives of my own State.

Second, I want to ask you again, whichever of you is prepared to answer, are you making an affirmative effort to spend money for services beyond just contracting that are necessary for the carrying out of your objectives under the Transportation Act, such as legal services, supportive services, insurance, whatever?

Mr. **Evans**. Yes, sir, we are.

Mr. **Byrd**. We do have at this time two supportive services contracts, one for the OJT program. That is in connection with on the job training, and the supportive services project for the minority business enterprise program.

Mr. **Savage**. Really what I am hoping I can get from you—pardon me.

Mr. **Byrd**. One of the contracts is with a minority firm.

Mr. **Savage**. What I am hoping I get is a breakdown percentagewise of the total you spend for supportive services under this program; what percentage is spent with minority firms is really what I am trying to get at, the same as you do in your overall figures.

Mr. **Byrd**. The percentage would be roughly 50 percent.

Mr. **Savage**. I don't want to know what it would be. I want to know what it is.

Mr. **Byrd**. It is roughly 50 percent.

Mr. **Savage**. Are you guessing?

Mr. **Byrd**. I am somewhat guessing, but we have two contracts.

Mr. **Savage**. I don't want you to somewhat guess. Let me repeat my question. In your construction contracts you are talking about percentage. Now, any of your transportation programs you spend a certain amount of money, a certain portion of the money you spend goes for supportive services. Whatever portion that is, what percentage of that portion do you spend with minorities? The reason I ask, and I want you to know the importance of this, we find in my State that in doing business with the DBE's in the contracting field we don't get a proportionate number of black-owned firms under the category of minority. We get a higher proportion of Asian firms and so on and so forth in my State. In order that minority won't become almost meaningless to blacks, or a cover to hide up the shortfall for blacks, often the proportion of money spent with minority firms under supporting services is a way out. Do you understand what I mean?

Mr. **Gadson**. You are asking, are we using attorneys, accountants?

Mr. **Savage**. All supportive services. If you place an insurance contract, you use a black broker.

Mr. **Gadson**. I think Mr. Fletcher could respond. I would say the overwhelming majority of the funds that are listed now are going to contractors. However, professional people are encouraged also to get on the list and those people availability are also made known to contractors.

But I would say as of this time, it is my understanding there have been some attorneys, small numbers, used to help obtain right-of-ways. I would say if you are looking to see if we are using them in a sufficient proportion, I would say we have a lot to do in that direction.

Mr. **Savage**. Let me suggest in conclusion, Mr. Chairman, and this would be true of both of the States, I find that often in the set aside, in the program that involves set aside, that they don't give as much attention as they might to supportive services, and the importance in doing so is often it can be used to help balance the makeup even of your DBE's in terms of racial makeup and things like that.

So I would urge that each of the States, including South Carolina, maybe you want to start breaking down your total figures in terms of percentage of contracts with minority firms or DBE's, that you might want to breakdown, separate out, what percent is being received for supportive services where blacks may be more available. Thank you.

Mr. **Mitchell**. Your point is well taken. As you well know, this is a part of the background of the law because of past discrimination and exclusionary practices. We knew that there would be very few black bridges built, and we knew that there would be very few Hispanics who were able to do surface road work. Therefore, as a part of the regulations it spells out that anything that is related to the Surface Transportation Act can be counted as a part of your set aside such as your lawyers, food service, suppliers, what have you. I think Congressman Savage's point is well taken. We do need to emphasize that a bit more.

Mr. EVANS. We have in the area of legal services, attorney general of South Carolina is firmly committed to that form of action. We use a lot of minority attorneys in handling our title examinations, things of that nature, all of which leads up to the project. So we are aware of that and we do appreciate the comments of the chairman.

Mr. MITCHELL. All of that which can be counted under the Surface Transportation Act is a part of the goal and that's good. However, it is in other areas of State activity that can't be counted under this.

Mr. GADSON. I just want to point out again Commissioner Rush's presence here today as part of the governing board of South Carolina Department of Highways. I assure you she is very active in keeping this issue at the commission's level and at the policy level in the department of highways, and she is here today to observe. I am sure that whatever suggestions you have will be carried back to South Carolina.

Mr. MITCHELL. I have had the pleasure of having several colloquies with the commissioner. I know her. All that I would do is to remind her that the language as it is written in the law says at least 10 percent. So if you want to achieve 40 percent in South Carolina, go for it, or 50 percent. Thank you very much.

[Governor Riley's prepared statement with attachments follows:]

PREPARED STATEMENT OF RICHARD W. RILEY, GOVERNOR, STATE OF SOUTH CAROLINA

To Congressman Mitchell, and each of the other members of the COMMITTEE ON SMALL BUSINESS, I wish to express my sincere appreciation to you for this opportunity to comment on the issue before your Committee today. I wish especially to express my appreciation to you, Congressman Mitchell, for your long time commitment to the promotion of small businesses and your leadership in the minority business development process, including your authoring Section 105(f) of the 1982 Surface Transportation Assistance Act.

Let me hasten to say that I, too, have initiated and support special activities designed to promote the development of small businesses in our state. Key among our initiatives is a buyer-supplier match program between larger firms and small businesses as suppliers and subcontractors. I also initiated several projects especially oriented towards assistance to minority owned firms. Among these special projects are: the creation of the OFFICE OF SMALL AND MINORITY BUSINESS ASSISTANCE. Our state was among the first in our region to pass legislation mandating that minority firms be utilized in the procurement of goods and services. This legislation also requires that each state agency set reasonable goals for procurement from minority firms. Other initiatives include the creation of a new financing mechanism known as the JOBS-ECONOMIC DEVELOPMENT AUTHORITY, with a specific mission to finance small businesses that create jobs in the state. Special considerations are given minority firms as they come before this Authority. I also appointed several task forces charged to find better ways to create and utilize existing resources that will expand the development of small businesses in South Carolina. In eacn of these efforts, Minority Business Development had a high priority.

Prior to my specifically addressing the concerns of your letter, I will give you a little background on the administrative structure of our state. Our state is one which has a strong and active legislature. We operate through a decentrilized executive and management system. To administer the state's various obligations, we have in excess of 100 independent state agencies. Each agency is designed to carry out specific missions. These agencies are generally governed by what are commonly called Boards, Commissions, Authorities, or Trustees. These Boards are generally appointed by the Governor and/or the Legislature. Many times there are a combination of appointments by the Governor and the Legislature.

The South Carolina Department of Highways and Public Transportation is operated by a Governing Commission. The Commission is composed of 20 Commissioners, each representing a judicial circuit. Each Commissioner is elected by the legislative delegations from those circuits. The

Governor appoints two (2) members to the Commission and there are two (2) ex-officio legislative members. This Commission in turn selects a Chief Commissioner for a four (4) year term. Under the policy direction of this Commission, the Chief Commissioner has the responsibility to administer the Highway program of the state. Through continuous communication with the Commissioners and the Chief Commissioner, I maintain a close working relationship with the Department of Highways and Public Transportation. As Chief Executive Officer of the state, I take responsibility to promote good leadership and to maintain the state's appropriate relationship with the Federal Government. Through our Budget and Control Board procedures, I also promote assurances that agencies comply with appropriate laws and regulations.

In order to respond to your request, I asked the Chief Commissioner of the South Carolina Department of Highways and Public Transportation to provide me with the appropriate background and documents for this presentation. A more detailed copy of the Commissioner's response is attached to your copy of my testimony. Please use it for more detail to some of my comments. (See Attachment I and Attachment II)

CONTRACTING OPPORTUNITIES FOR DBEs AND WBEs, FY 1983 and 1984

The final rule implementing Section 105 (f) was published in the Federal Register on July 21, 1983. The regulations require that the SOUTH CAROLINA DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION submit a goal for the participation of DBEs and that the Department adopt a program and a series of activities that will facilitate the achievement of these goals.

Further, the 1984-85 General Appropriations Act of the state of South Carolina (Act # 512 of 1984), as enacted by the General Assembly, contained a clause that "urges South Carolina Department of Highways and Public Transportation to comply with Section 105 (f) and authorizes and directs it to effectuate and assure such compliance through contract documents and such rules and regulations as may be necessary."

The Department now has the additional state authority to effectuate an improved administration of the requirements of Section 105 (f) of the Surface Transportation Act.

SCDHPT'S CERTIFICATION PROCESS

It is my understanding that there have been few problems with our certification process. The Department's procedures follow very closely those guidelines outlined in the Federal Register. Our major problem to date may be one of sufficient personnel and resources to speed the Certification process. The Department does honor the certification from other state Highway Departments, in which case we depend upon those departments' investigations. However, if any observation of a particular out-of-state firm warrants further verification, the Department in conjunction with that state will perform such investigations. (See Attachment on Certification)(Attachment I, page 3 and 4)

METHODS OF INFORMING DBEs of SPECIFIC CONTRACTING OPPORTUNITIES

The SCHDPT maintains a list of certified DBEs/WBEs and these firms are sent notices by the Department of each proposed contract at the same time prime contractors are notified. A list of certified DBEs/WBEs is also included in each contract proposal which contains a stated goal for DBEs/WBEs. Contractors are instructed to advertize in both general circulated media and minority-focused media. The Department's officials meet frequently with trade associations and other organizations to explain the DBE program and to urge minority firms to apply for certification. Minority firms are encouraged to communicate with prime contractors in their respective areas.

METHODS TO INSURE COMPLIANCE WITH SECTION 105 (f)

The SCDHPT has followed a policy of establishing individual contract goals in Federally aided construction work. It has also followed a policy of rejecting all bids when the low bidder fails to meet or demonstrate a good faith effort to meet the goals established. During the fiscal years of 1983 and 1984, the SCDHPT rejected 17 contracts valued at 25.6 million dollars in low bids. These rejected bids were from firms who did not meet the goal or did not show good faith in their attempting to reach the goals established. Upon the reprocurement of these projects, prime contractors tended to comply with the goals established by the Department. The Department has recently instituted legal provisions and procedures to move to the next low bid if compliance with Section 105 (f) was not established by the low bidder. Further, beginning in October of this year, failure on the part of the low bidder to meet the goals or to make good faith efforts to meet the goals prior to the award date may result in forfeiture of bid bond or disqualification for bidding pursuant to SCDHPT Regulation 63-310 (b). If a prime fails to meet the goals as agreed after an award, the Department may withhold progress payments, or declare the contractor in default and proceed to disqualify him from bidding. (See Attachments II for more details) (Attachment II, pages 1 and 2)

TECHNICAL AND SUPPORTIVE ASSISTANCE

Through the services of supportive consultants, both primes and DBEs/WBEs are assisted. Primes are assisted in the location of DBEs and WBEs. DBEs/WBEs are provided assistance in areas such as prequalification, licensing, bid preparation, bonding, financing and related services designed to assist them in overcoming practical problems or other institutional barriers. Many of these areas continue to be problem areas for us. Notable among the problem areas are financing development for contractors and bonding for many of our small firms. We will continue to work toward eliminating many of these problems by working with other institutions and organizations with particular resources. The local Board of the Association of General Contractors has agreed to hold seminars in specialty areas to improve the number and quality of subcontractors on highway projects.

EXPENDITURES WITH DBEs and WBEs

The total Federal dollars obligated for fiscal year 1983 was 109.4 million. In accordance with implementing regulations, the SCDHPT's goal for 1983 was 8.2% for DBEs and .15% for WBEs. At the end of fiscal year 1983, 6.8 million dollars or 6.2% was authorized for performance for DBEs and 1.5 million was authorized for WBEs. As you can see, we were a little short of our goal, but significant progress had been made.

The Federal aid available for 1984 was 101.2 million dollars. The Department's goal for 1984 was 10% for DBEs and 1% for WBEs. As of August 24, 1984, 15.1 million dollars had been authorized for the same period. The larger amount of 15.1 million, referenced above, included a carry forward not authorized in 1983. As of August, 1984, 2 million dollars was authorized for WBEs for the 1984 fiscal year. Based upon these data made available to me by our Commissioner, 9.6% of the total Federal aid available in 1984 for highway maintenance and construction (101.2 million) has been committed to DBEs and 1.23% has been committed to WBEs.

NEW ACTIVITIES AIMED AT FURTHERING THE SUCCESS OF THE DBE/WBE PROGRAM

1. The new Commissioner of the South Carolina Department of Highways and Public Transportation (SCDHPT) has authorized the reorganization of its Civil Rights Compliance Section into a Division status. This will enable the Department to address the question of compliance in a more comprehensive fashion. This process has already begun and will be completed within the next several months.

2. Beginning in October, 1984, SCDHPT will require quarterly reports from prime contractors indicating the amounts paid to DBE and WBE firms. The Department will also require documentation of contractual arrangements entered between primes and subcontractors. This process will enable the Department to monitor payments to DBE/WBE firms and will improve our compliance and reporting requirements.

3. Beginnning in October, the Department will require the prime to notify SCDHPT eleven (11) days prior to the letting of those portions of jobs available for subcontract. The Department will in turn disseminate this information to DBEs/WBEs.

Again, as Governor, I have placed the development of small businesses as a high priority as a means toward full development of our state's resources. Procurement from public and private sources is a must. We have initiated, as indicated earlier, a developing financing authority, a buyer-supplier match program, and have designated lead agencies and personnel to follow through in areas such as technical and management assistance and capital development. We have asked all state agencies to strive toward a goal of 10% of their controllable procurement dollars for procurement from disadvantaged businesses. I believe under the leadership of our new Chief Commissioner, Mr. Walker P. Ragin, the South Carolina Department of Highways and Public Transportation will meet its goals as required through Section 105 (f) of the Surface Transportation Act.

For more detail on some of my comments, please see the attached background information, including the new "Special Provisions and Instructions to the Prime Contractor." (Attachments I and II)

ATTACHMENTS

ATTACHMENT I:	Response to Governor Richard Riley From Chief Commissioner Walker P. Ragin, South Carolina Department of Highways and Public Transportation
ATTACHMENT II:	Contract Provisions, South Carolina Department of Highways and Public Transportation, "Special Provisions" and "Instructions to Bidders"

ATTACHMENT I

Response From South Carolina
Department of Highways and Public Transportation

to

Richard W. Riley, Governor

CONTRACTING OPPORTUNITIES FOR DBE'S AND WBE'S - FY 1983-1984

Section 105(f) of the Surface Transportation Assistance Act of 1982 directs the Secretary of the United States Department of Transportation to attempt to insure that a certain portion of federal apportionments be expended with small businesses owned and controlled by socially and economically disadvantaged individuals. Subsection (f) provides:

> Except to the extent that the Secretary determines otherwise, no less than 10 per centum of the amounts authorized to be appropriated under this act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by Section 8(d) of the Small Business Act (15 USC Section 637(d) and relevant subcontracting regulations promulgated pursuant thereto.

The Final Rule implementing Section 105(f) was published in the Federal Register on July 21, 1983 and is found in 49CFR Part 23. These regulations require the South Carolina Department of Highways and Public Transportation (SCDHPT) to submit a goal for the use of Disadvantaged Business Enterprises (DBE's) and adopt a program to meet the goal. Section 119 of the General Appropriations Act, 1984-1985 of the State of South Carolina (Act #512 of 1984) urges the South Carolina Department of Highways and Public Transportation to comply with Section 105(f) and authorizes and directs it to effectuate and assure such compliance through contract documents and such rules and regulations as may be necessary.

The SCDHPT overall goal for Fiscal Year 1983, as approved by the Federal Highway Administration, was set at 8.2 percent for

DBE's and .15 percent for WBE firms of the total Federal Aid apportionment for South Carolina. At the end of Fiscal Year 1983, $8,979,437 worth of work had been committed to DBE subcontractor firms and $1,792,330 to WBE firms by prime contractors. At that time, $6,786,653 had been authorized (SCDHPT approved DBE subcontractors) for DBE and $1,546,983 was authorized for WBE firms. The amounts committed represented 8.2% and 1.6% respectively of approximately $109.4 million in Federal Aid funds obligated for contracts as of September 30, 1983.

The SCDHPT overall goals for current Fiscal Year 1984 are 10% of South Carolina Federal Aid apportionment for DBE's and 1% for WBE's. As of August 24, 1984, $9,766,524 worth of Federal Aid work had been committed to DBE subcontractors by prime contractors and $1,247,251 to WBE firms. $15,141,343 has been authorized to be performed by DBE's during the same period. The excess amount authorized over the amount committed is a result of Fiscal Year 1983 commitments. The WBE firms have been authorized to perform $2,007,886 in Fiscal Year 1984 as of August 24, 1984. Based on these commitments, DBE's are receiving 9.65% of $101.2 million of apportioned Federal Funds and WBE's are to receive 1.23%.

One of the principal reasons for the SCDHPT's 1984 commitments being below 10% at the present time is the 1984 FHWA authorization to proceed with a major bridge design consulting contract. This contract has been in the planning and negotiating stage for nearly 3 years and its authorization for funding by the FHWA in Fiscal Year 1984 has impacted upon the meeting of our goal at the present time. In anticipation of this, a DBE goal of 11% was placed in all Federal Aid contracts effective with the February, 1984 letting.

SCDHPT'S CERTIFICATION PROCESS

The integrity of the DBE program depends on procedures that assure only bona fide firms are certified. To become certified DBE or WBE, firms must show that they are a small business owned and controlled by socially and economically disadvantaged individuals as defined by the Small Business Act. Obviously the SCDHPT must insure compliance with the Federal laws and regulations. To insure eligibility under such Federal requirements, the SCDHPT investigates each applicant firm by examining its financial condition, the experience and control of the principals and operators of the business, the equipment owned by the business, its legal status, i.e. whether it is a corporation, partnership, or sole proprietorship, the ownership thereof, the number of employees, equipment lease agreements, and other business factors. In addition to the review of such business and legal documents, a Department analyst conducts an on-site verification and validation review of the applicant firm. Principals, employees and others familiar with the firm are interviewed. Upon completion of the review of such information, an eligibility determination is made. To date, the SCDHPT has not adopted a formal decertification process but follows Federal regulations in such cases and will afford notice and an opportunity at a hearing with right of judicial review under the South Carolina Administrative Procedures Act, Code of Laws of South Carolina, §1-23-310 et.seq. Third party challenges are also accepted pursuant to Federal regulations. By following these procedures, the SCDHPT believes that only bona fide firms will become certified and that its procedures will adequately protect those rights of the firms who apply and are accepted.

Once certified as a bona fide DBE/WBE, that firm, to be a subcontractor, does not have to be prequalified prior to approval as a subcontractor on a SCDHPT contract. There are no formal minimal financial or equipment requirements imposed by the SCDHPT. Subcontractors need not obtain a contractor's license if the prime contractor is licensed. Any prime contractor prequalified with the Department is granted a license from the South Carolina Contractor's Licensing Board upon payment of a fee. In order to establish a good faith effort in locating and utilizing DBE/WBE's, each bidder must document the efforts it made in assisting them in any bonding or insurance required by the prime contractor. Prequalification, bonding and licensing requirements for DBE/WBE prime contractors are the same as for non DBE/WBE's and are considered necessary and essential for the protection of the public.

METHODS OF INFORMING DBE'S OF SPECIFIC CONTRACTING OPPORTUNITIES

The SCDHPT maintains an updated list of certified DBE's and WBE's who have expressed interest in performing highway related work. This list is included in each contract proposal which contains a stated goal for DBE/WBE participation. In evaluating whether a prime contractor has made a reasonable good faith effort in meeting the stated contract goals, he must show the following:

1. That he advertised for and solicited DBE/WBE quotations and participation on said contract in the general circulation media and the minority focus media.
2. That he selected portions of the work to be subcontracted to increase the likelihood of meeting contract goals and provide written notice to interested DBE/WBE's of such subcontracting opportunities.
3. That he notified the SCDHPT 11 days prior to letting of those portions of jobs he is willing to subcontract. The SCDHPT Office of Equal Opportunity and Training will then disseminate such information to the intended DBE/WBE's.*
4. That he contacted the Supportive Services Consultant of the SCDHPT for assistance in locating certified DBE's or WBE's who could perform work on the contract.*

These procedures are included in contract documents for the Department's October Letting and are a direct result of one year of negotiations and discussions of a task force comprising State and Federal government officials, members of the minority contracting community and industry contractors. Additionally, each certified DBE/WBE is sent notice by the Department of each proposed contract when the contractors themselves are notified.

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*To take effect in October, 1984 Letting.

Upon implementation of these contract provisions, the SCDHPT is confident that certified DBE/WBE's will be adequately apprised of available contracting opportunities.

METHODS TO INSURE COMPLIANCES WITH SECTION 105(f)

In addition to the establishment of individual contract goals in federally aided construction work and the compilation of a list of DBE/WBE certified firms which is included in the SCDHPT contract proposals, the SCDHPT has followed a policy of rejecting all bids when the low bidder fails to meet or demonstrate a good faith effort to meet the goals established. During Fiscal Years 1983-1984, the Department has rejected 17 contracts valued at $25,644,783 (low bid). Upon reprocurement of such jobs, the results generally have been to achieve compliance with DBE requirements with no substantial adverse economic impact. Because of the delays this procedure has caused, the SCDHPT has amended its contract documents effective October, 1984 which will enable it to award contracts to other than the lowest bidder if DBE/WBE goals are not met or a reasonable good faith effort to meet the goals has not been demonstrated.

Failure on the part of the low bidder to meet the goals or make good faith efforts to meet the goals prior to award may result in forfeiture of the bid bond or disqualification for bidding pursuant to SCDHPT Regulation 63-310(b). See Special Provision (DBE/WBE) 9/20/84; Section 4. If the contractor fails to meet the goals as agreed after award, the SCDHPT may withhold monthly progress payments, declare the contractor in default or proceed to disqualify him from bidding. Additionally, the SCDHPT contract documents are to be amended in October, 1984 so as to require quarterly reports concerning the amounts paid to DBE/WBE firms by the prime contractor and shall allow the Department access to contractual documents entered between the prime and subcontractor. These measures will enable the Department to monitor the payment to the DBE/WBE and insure compliance with Section 105(f).

TRAINING AND SUPPORTIVE ASSISTANCE

Supportive assistance is provided to prime contractors seeking DBE/WBE participation by a consultant employed by the Department and funded by the FHWA. DBE/WBE's are provided assistance by the consultant in the area of prequalification, licensing, bid preparation, bonding, project financing and related services designed to assist them in overcoming practical problems or institutional barriers. Other technical assistance is available to DBE's and WBE's on a referral basis. The SCDHPT has established and will continue to expand their working relationship with the U.S. Small Business Administration, the U.S. Department of Commerce, Minority Business Development Center, the U.S. Department of Transportation, the S. C. Governor's Office, private consultants, lending institutions and surety representatives. Additionally, the SCDHPT and the local board of the Association of General Contractors are developing training seminars for DBE/WBE's to be funded by the SCDHPT and staffed by area contractors in order to insure competent and competitive DBE/WBE participation in the highway construction industry. This training will cover such areas as Standard Specifications in Highway Construction, plan reading and interpretation, estimating, accounting, long-term scheduling, and other problem areas as may be needed.

ATTACHMENT II

Contract Provisions

of
South Carolina Department of Highways and Public Transportation

"Special Provisions"
and
"Instructions to Bidders"

9/20/84

SPECIAL PROVISIONS

DISADVANTAGED AND WOMEN BUSINESS ENTERPRISES (DBE)/(WBE)

1. POLICY

It is the policy of the South Carolina Department of Highways and Public Transportation that certified disadvantaged business enterprises and women business enterprises (DBE's and WBE's), as defined in 49 CFR, Part 23, as amended, shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. It is further the policy of the SCDHPT to comply with § 105(f) of the Surface Transportation Assistance Act of 1982.

2. DEFINITIONS

For purposes of this provision the definitions found in 49 CFR 23, as amended, are adopted by reference.

3. AIDS TO CONSTRUCTION

This provision should be interpreted liberally to achieve the goals required by the Surface Transportation Assistance Act of 1982. In instances of ambiguity or questions of interpretation, reference shall be made to that act and regulations found at 49 CFR 23, as amended, and its authorizing legislation.

4. OBLIGATION

The Contractor shall take all necessary and reasonable steps in accordance with 49 CFR, Part 23, as amended, to ensure that certified disadvantaged and women business enterprises have the maximum opportunity to compete for and perform a portion of the work included in this contract and shall not discriminate on the basis of race, color, national origin or sex. Failure on the part of the Contractor to meet the goals or make good faith efforts to meet the goals prior to or after award shall result in any one or more of the following sanctions: (1) forfeiture of the bid bond; (2) disqualification from bidding pursuant to SCDHPT Regulation 63-310(b); (3) the withholding of monthly progress payments; (4) declaring the contractor in default pursuant to §108.10 of the Standard Specifications and termination of the contract; and (5) the assessment of liquidated damages in the amount of the difference in the stated goals of the contract and the actual payments made to the certified DBE or WBE. Failure by the Contractor to meet this goal or furnish the necessary good faith documentation does not negate the Department's right to award and execute the contract.

5. REPLACEMENT OF CERTIFIED DBEs AND WBEs

After execution of the contract, if any certified DBE or WBE is decertified or cannot perform satisfactorily to the extent indicated or defaults, the Contractor shall take all necessary, reasonable steps to replace the certified DBE or WBE Subcontractor with another certified DBE or WBE Subcontractor respectively. Any certified DBE or WBE who has been certified prior to the date of approval of subcontractors by the Department may be used as replacements. Prior to replacement, the contractor shall provide the Department with its reasons for the need of replacement, shall notify the DBE of its intent to replace him, and shall inform the Department whether the DBE objects to the replacement. If there is no objection, the contractor may replace the DBE/WBE in accordance with this section. If the DBE objects then the Department shall approve or disapprove the replacement based on facts presented. In no case shall the contractor's ability to negotiate a more advantageous contract with another subcontractor be considered a valid basis for change.

To demonstrate necessary, reasonable efforts, the Contractor shall document the steps he has taken to replace any DBE or WBE Subcontractor that is decertified or unable to perform successfully with another certified DBE or WBE Subcontractor. Such documentation shall include but will not be limited to the following:

(a) Copies of written notification to certified DBEs and WBEs that their interest is solicited in subcontracting the work defaulted by the previous certified DBE or WBE Subcontractor or in subcontracting other items of work in the contract.

(b) Efforts to negotiate with certified DBEs and WBEs for specific subbids including at a minimum:

  (1) The names, addresses, and telephone numbers of certified DBEs and WBEs who were contacted;

  (2) A description of the information provided to certified DBEs and WBEs regarding the plans and specifications for portions of the work to be performed; and

(3) A statement of why additional agreements with certified DBEs and WBEs were not reached.

(c) For each certified DBE or WBE contacted but rejected the reasons for the Contractor's conclusion.

(d) Documentation demonstrating that the Contractor contacted the Supportive Service Consultant of the SCDHPT for assistance in locating certified DBEs willing to take over the work or do other work in order that the goal will be met.

Failure of the Contractor to demonstrate reasonable efforts to replace a certified DBE and/or WBE with another certified DBE or WBE firm that cannot perform as intended shall constitute a breach of contract and may result in declaring the contractor in default pursuant to §108.10 of the Standard Specifications and the termination of the contract, the withholding of monthly progress payments, or the assessment of liquidated damages as specified in Section 4 of this Special Provision. No payment or monetary compensation of any kind shall be made to the contractor for damages because of hindrance or delay from any cause in the progress of work attributable to certified DBE or WBE subcontractors.

6. COUNTING CERTIFIED DBE OR WBE PARTICIPATION TOWARD MEETING DBE OR WBE GOALS

The total dollar value of work sublet to or materials supplied by any certified DBE or WBE will be counted toward the applicable goals. Certified DBE or WBE participation shall be measured by the actual payments made to the certified DBE and WBE subject to the following conditions:

(1) The total dollar value of a contract to a certified DBE owned and controlled by both disadvantaged males and nondisadvantaged females is counted toward the goals for disadvantaged businesses and women businesses, respectively, in proportion to the percentage of ownership and control of each group in the business. The total dollar value of a contract with a certified DBE owned and controlled by disadvantaged women is counted toward either the disadvantaged goal or the goal for women businesses, but not to both. The Contractor employing the firm may choose the goal to which the contract value is applied.

(2) The Contractor may count toward its certified DBE or WBE goals a portion of the total dollar value of a contract with a joint venture eligible under the standards of 49

CFR 23, as amended, equal to the percentage of the ownership and control of the certified DBE or WBE partner in the joint venture.

(3) a. The Contractor may count toward its certified DBE or WBE goals only expenditures to certified DBEs or WBEs that perform a commercially useful function in the work of a contract. A certified DBE or WBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, or supervising the work involved. To determine whether a certified DBE is performing a commercially useful function, the Department will evaluate the amount of work subcontracted, industry practices, and other relevant factors.

b. Consistent with normal industry practices, a certified DBE or WBE may enter into subcontracts. In selecting a subcontractor the certified DBE shall use reasonable good faith efforts to secure a certified DBE or WBE subcontractor. If a certified DBE or WBE Subcontractor subcontracts a portion of the work to a non-DBE or a non-WBE, the dollar value of the work subcontracted will not count towards meeting the goal.

(4) The Contractor may count toward its goals expenditures for materials and supplies obtained from certified DBE or WBE suppliers and manufacturers, provided that the certified DBEs or WBEs assume the actual and contractual responsibility for the provision of the materials and supplies under to following conditions.

a. The Contractor may count its entire expenditure to a certified DBE or WBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

b. The Contractor may count 20 percent of its expenditures to certified DBE or WBE suppliers that are not manufacturers, provided that the DBE or WBE supplier performs a commercially useful function in the supply process.

7. REPORTS

Upon request of the Department's DBE/WBE Liaison Officer, the contractor shall furnish such information, including subcontracts, as is necessary to verify the amount and cost of the materials supplied by certified DBE or WBE suppliers and the amount and cost of the work or services performed by the certified DBE or WBE subcontractor. The contractor shall require its subcontractors to furnish such information to it if needed by the Department. Such information shall be kept at least three years from the date of the final settlement of the contract.

Quarterly Reports of the amount of payments to the certified DBE or WBE, signed by both the Contractor and the certified DBE/WBEs shall be submitted to the Department's DBE/WBE Liason Officer on January 1, April 1, July 1, and October 1. Failure to submit such reports may result in the withholding of monthly progress payments or final payments.

8/21/84 final

INSTRUCTIONS TO BIDDERS

DBE/WBE GOALS

Pursuant to Rules and Regulations contained in 49 CFR, Part 23, as amended, goals for participation by certified DBEs and WBEs are included in this contract. The goal for such business is the percentage listed below of the total contract amount bid by the Contractor or the amount specified in this proposal.

Disadvantaged Business Enterprises ____________________%

Women Business Enterprises ____________________%

The Contractor shall exercise all necessary and reasonable steps to ensure that disadvantaged business enterprises and women business enterprises perform services or provide materials on this contract in an amount equal to the established goals. Signing the bid proposal shall constitute an agreement to meet the stated goal or make good faith efforts to meet such goals.

CERTIFIED DBE/WBES INFORMATION NECESSARY

As a condition of a responsive bid, the bidders shall submit the information required by paragraph A with the bid proposal. If the information submitted in response to Paragraph A reflects that the Contractor does not meet the certified DBE or WBE contract goals, the bidder must submit information to satisfy the SCDHPT that sufficient reasonable efforts have been made to meet the contract goals. This information must be furnished in writing either in the bid proposal or to the office of the Contract Administrator, Silas Pearman Building, Room 312, 955 Park Street, Columbia, South Carolina 29202 within six (6) calendar days of the day bid proposals are opened. Failure by the contractor to furnish the necessary information may result in the award being made to the next lowest responsive and responsible bidder or the rejection of all bids, but does not negate the Department's right to award and execute the contract. The listing of the DBE/WBE shall constitute a commitment to utilize that particular subcontractor subject to the replacement provision of Section 5 of the Special Provisions on DBE/WBE. Failure to utilize said subcontractor may result in the applicable sanction of Section 4 of the Special Provisions on DBE/WBE being imposed.

A. The following information shall be supplied on forms furnished by the SCDHPT to be signed by the Contractor, which have been included as a separate insert in this proposal form, to the Department.

(1) The names and addresses of certified DBE and/or WBE firms whose services or materials will be used in the contract;

(2) The items of work to be performed or materials to be supplied and the dollar amount of participation by each named DBE/WBE firm.

FACTORS CONSIDERED IN DETERMINING GOOD FAITH EFFORTS

The Department will consider the following factors in determining whether or not a bidder has made sufficient reasonable good faith efforts to meet the contract goals:

(1) whether the bidder advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;

(2) whether the bidder selected portions of the work to be performed by certified DBEs in order to increase the likelihood of meeting the contract goals;

(3) whether the bidder gave written notice to the Office of Equal Opportunity and Training of the SCDHPT at least eleven (11) calendar days prior to the letting, of the portion of the work that the bidder proposes to subcontract. If a bidder finds that the eleven (11) day period could not be complied with, the data must be submitted as quickly as possible and the bidder must provide justification as to why the eleven (11) calendar day period could not be complied with.

(4) the extent to which the bidder provided written notice to those certified DBEs and WBEs who were listed in the Department's certified directory as being interested and capable of performing subcontract work which is available in this particular contract and a description of the information provided to them regarding the plans and specifications for portions of the work to be performed.

(5) whether in soliciting quotes, the contractor, furnished at least the following information to the certified DBEs and WBEs.

(a) Contractor's name, address and telephone number;
(b) The project location and description;

(c) Work to be subcontracted including a specific description of the work involved;
(d) A place where bidding documents can be reviewed by a subcontractor;
(e) A particular contractor's representative to contact;
(f) The date, time and location when subbids must be received by the contractor.

(6) whether the bidder solicited quotes in good faith from interested certified DBEs and WBEs, not rejecting them as unqualified without sound reasons based on their capabilities and prices.

(7) whether the bidder made efforts to assist interested DBEs and WBEs in obtaining any required bonding or insurance. If the bidder does not require a bond of a certified DBE or WBE, this factor will be considered in determining good faith effort.

(8) whether the bidder contacted the Supportive Services Consultant of the SCDHPT for assistance in locating certified DBEs or WBEs who could perform work on this contract.

(9) whether the contractor solicited DBE's and WBE's capable of performing the scope of work which is to be subcontracted. A contractor openly and obviously soliciting quotes from DBE's or WBE's without consideration to the particular DBE/WBE's area of expertise shall not be considered a good faith effort.

DBE/WBE DIRECTORY

Enclosed in this proposal is a directory of subcontractors who have been certified as meeting the definition of a disadvantaged or women business enterprise as defined in 49 CFR, Part 23, as amended. Any DBE/WBE certified prior to the day bid proposals are opened may be utilized by the Contractor in his proposal to meet the applicable goals.

MINORITY FOCUS MEDIA

A non-exclusive listing of minorty focus media may be obtained from the Office of Equal Opportunity and Training of the SCDHPT upon request.

Mr. MITCHELL. Let me just say for this panel and the other panels remaining, we have tried to move this as fast as we could. I know it has been tough for you.

TESTIMONY OF HAROLD C. KING, COMMISSIONER, DEPARTMENT OF HIGHWAYS AND TRANSPORTATION, STATE OF VIRGINIA, ACCOMPANIED BY CAROLYN JEFFERSON-MOSS, DIRECTOR, OFFICE OF MINORITY BUSINESS ENTERPRISE

Mr. KING. I apologize for trying to adjust our place on the agenda. I scheduled a previous legislative commitment and after the Governor made this commitment for me and I was trying to fulfill both of them.

Mr. MITCHELL. I can understand. You notice how the members have come in and out. They are going to other commitments and they are coming back. I apologize, but we just couldn't do it.

Mr. KING. If I might try to just jump through the different areas here that I think are the points that possibly you are trying to cover, and I can assure you, as the opening statement says, that the Governor and the Commonwealth fully, and I say enthusiastically, supports this legislation to increase participation of the economically and socially deprived people.

Within our State government, I have instituted a somewhat similar concept in the purchasing practices of our agencies. They have made commitments with me to work toward agreed upon levels of participation by companies owned by minorities and women in the State's procurement of goods and services. Identification of existing policies and procedures which may discourage DBE participation and the steps necessary to assist such firms to become actively involved in highway work, and the necessary enforcement to ensure individual contract compliance and overall program compliance.

In regard to the first of these, the identification of existing policies and procedures which may discourage DBE's, several obstacles have been removed.

One, the contractor prequalification requirements have been eliminated for subcontracting companies performing work up to $1 million in value. A modified prequalification procedure has substantially reduced the requirements for small contractors to bid as prime contractors on various types of projects estimated not to exceed $300,000 in value. No prequalification.

Mr. MITCHELL. That is excellent.

Mr. KING. Also, the requirement for bonding on subcontract work has been abolished.

Jumping over to page 5, during the past fiscal year, through a memorandum of agreement with the department of highways and transportation, our office of minority business enterprise offered significant help to disadvantaged companies, and Ms. Carolyn Moss who heads that office is here and will cover those points in just a minute.

I switch to page 13, the third broad area toward the Commonwealth's efforts have been directed is that of enforcement in respect to individual contract and overall program compliance. I want to turn now to that area.

Enforcement is achieved mainly through requirements and procedures established in contract specifications and special provisions through associated administrative directives, and through contract monitoring.

I will jump to page 16. The staff of the EEO division has been expanded from five to nine to allow formation of a fulltime compliance review team to investigate complaints and other allegations of improprieties in the DBE program. The department's construction division will continue to be responsible for all facets of contract compliance while the EEO division will act to perform indepth compliance audits on contracts, the contract people out there on the job seeing that the DBE's is on the work, that he is doing the work, that the leadership is there. If he sees any problem, he calls in the EEO division, and that EEO officer in that district, if he thinks he's got any problem, he's got the compliance division to call and assist.

In addition, monthly reports from prime contractors and subcontractors provide detailed information as to DBE work on each project. The prime contracters and DBE's are also required to certify the amount of money committed for performance of subcontract work.

Sanctions for noncompliance or for failure to accomplish required DBE participation are established clearly by special contract provisions. The contractor must produce.

In the preaward stage, noncompliance includes failure to submit the information needed to ensure DBE participation or to determine the acceptability of good faith efforts. As I have indicated, the sanctions for noncompliance at this state is rejection of the bid and enjoinment from further bidding for 90 days.

Going to page 21, in the first 10 months of fiscal 1984, Virginia awarded highway contracts involving $127.2 million in Federal funds, and $23.5 million, or 18.5 percent, went to DBE's. We expect the total DBE participation will have exceeded 15 percent at the close of the current fiscal year.

Mr. Chairman, those are the pertinent points of that testimony and I would be glad to have Ms. Carolyn Moss, who heads our minority supportive services contracts.

Mr. Mitchell. Good to see you again.

Ms. Moss. For the past 7 years the minority business agency in Virginia has implemented the supportive services program for minority contractors. Our services include everything from the dissemination of bid advertisements to the minority firms regarding contract opportunities, assistance in interpreting plans, VDHCT specifications, and road and bridge specifications, monitoring project showings, and assistance in obtaining prequalification and certification. We actually assist firms in completing the prequalification packages as well as facilitating clearance through the department.

This year in 1985, we are providing five new services that I would like to briefly discuss. First, we have developed a comprehensive computerized data base containing detailed information on the DBE firms, their specialty areas, the number of employees, preferred geographical areas for working, and preferred size of contracts. All of this information has been computerized The second component of our program this year is to provide this information to the prime contractors as requested. Prime contractors may simply walk in or call our office to request a listing of DBE's in a certain geographical area of the State, and within a certain specialty areas; we can extract this from the computerized data base.

A third component includes increased assistance to minority contractors in business skills development. We have found that many of our DBE contractors need assistance in actually setting up and maintaining their office, initiating good accounting principles, and so forth.

The fourth component is to provide in depth, one on one assistance to the DBE contractors that are performing on six of Virginia's largest construction projects. You might be aware that Virginia will have some fairly sizable projects under construction, and we feel that it was necessary to provide almost one on one assistance to the DBE's that will be performing on these larger projects. Therefore, we will be monitoring DBE participation from start to finish.

The last item that I would like to mention involves the prebid conferences initiated approximately 2 weeks prior to bid letting. Meetings are held all around the State where prime contractors and minority contractors are invited to review the plans and specifications for projects being bid in the next bid letting. We also ask the primes to submit, prior to each prebid conference, a written list of the items on which they wish to have quotes from DBE's. Of course, we make this information available at the prebid conferences and assist minority contractors in reviewing plans and specifications related to each individual project. This is a summary what we are doing in the supportive services program, and I, too, will be happy to answer any questions that you might have.

[Mr. King's prepared statement follows:]

PREPARED STATEMENT OF HAROLD C. KING, COMMISSIONER, DEPARTMENT OF HIGHWAYS AND TRANSPORTATION, STATE OF VIRGINIA

I thank you for the opportunity to appear before you to discuss Virginia's compliance with Section 105(f) of the Surface Transportation Assistance Act of 1982.

Let me assure you that the Governor of the Commonwealth of Virginia fully and enthusiastically supports the intent of this legislation, to increase the participation of socially and economically disadvantaged businesses in the federal-aid highway program.

Within state government, I have instituted a somewhat similar concept in the purchasing practices of our agencies. They have made commitments with me to work toward agreed upon levels of participation by companies owned by minorities and women in the state's procurement of goods and services.

In respect to the STAA of 1982, two of our agencies—the Department of Highways and Transportation and the Office of Minority Business Enterprise—are working together to achieve compliance with Section 105(f).

Our efforts have been concentrated in three broad areas:

(1) Identification of existing policies and procedures which may discourage DBE participation; (2) the steps necessary to assist such firms to become actively involved in highway work, and (3) the necessary enforcement to ensure individual contract compliance and overall program compliance.

In regards to the first of these, the identification of existing policies and procedures which may discourage DBE's, several obstacles have been removed.

Contractor prequalification requirements have been eliminated for subcontracting companies performing work up to $1 million in value.

A modified prequalification procedure has substantially reduced the requirements for small contractors to bid as prime contractors on various types of projects estimated not to exceed $300,000 in value.

The requirement for bonding on subcontract work has been abolished.

And, contractor licensing requirements have been waived for firms engaged solely in highway construction.

In taking these steps, the Commonwealth has tried to say to DBE's, in effect, that we not only need you to perform work for us, we will attempt to make it easier for you to do so.

In respect to the second of our broad areas, that of assisting such firms in other ways to become actively involved in the highway program, Virginia has relied upon state initiatives and basic supportive services contracts.

I want to comment on these two approaches separately.

During the past fiscal year, through a memorandum of agreement with the Department of Highways and Transportation, our Office of Minority Business Enterprise offered significant help to disadvantaged companies. Here are some of the ways:

It provided management and technical help in bonding, general bid preparation, interpretation of plans and proposals, project showings, notification of contract opportunities, interpretation of road and bridge specifications, follow-up project visits, pre-construction conferences, and financial loan packaging.

It assisted prime contractors in obtaining DBE and WBE participation.

It conducted educational workshops and seminars directed toward the management and technical needs of DBE firms in highway construction.

It disseminated educational materials providing state-of-the-art information on road construction techniques.

It assisted in the application for certification and, where necessary, for prequalification.

Under a similar arrangement in Fiscal 1985, the state Office of Minority Business Enterprise will take additional steps. For example:

It will develop and maintain up-to-date, computerized information on DBE firms, their specialty work areas, number of full-time employees, preferred geographic areas for work, and dollar size of contracts preferred.

It will assist prime contractors in identifying and contacting DBE firms as potential subcontractors.

It will provide management assistance in financial, marketing, and business skills development areas.

It will provide in-depth support to DBEs to ensure their successful participation on six projects anticipated to have the highest DBE dollars in subcontract work.

It has developed and implemented regional pre-bid conferences held two weeks before each letting date, to assist DBE firms in reviewing project plans and specifications, to provide information regarding prime contractors who request quotes on specific projects and work items, and to provide an opportunity for prime contractors to meet potential DBE subcontractors.

It has developed and implemented central pre-bid conferences the evening before each letting, to assist DBE firms in presenting quotes to prime contractors, who will in turn submit bids to VDH&T on the following morning.

And it will undertake other special initiatives to facilitate DBE participation in the highway program.

In an on-going process, the Office of Minority Business Enterprise uses direct mail to distribute notices of bid advertisements for construction projects to DBEs, to ensure their awareness of contracting opportunities.

Opportunities for consulting contracts are advertised in various news media, including minority-owned newspapers.

The department also uses the services of the Omega Group, Inc., a DBE firm which operates the U.S. Department of Transportation program management center for Virginia, West Virginia, Maryland, and the District of Columbia, to inform DBEs of contracting opportunities.

We will continue to give attention to the strengthening of the partnership between our Highway and Transportation Department and our Minority Business Enterprise Office, and to explore additional ways of alerting disadvantaged firms of business opportunities in Virginia.

Apart from these efforts, the Highway and Transportation Department enters into agreements with consulting firms for the provision of supportive services—and, incidentally, the two consultants employed thus far are themselves DBEs.

In Fiscal 1984, the Ronson Management Corporation of Arlington, Virginia, collected information on DBE specialty work areas, the size of their work force, their bonding capability, prequalification limit, preferred dollar volume of work, preferred geographic areas of work, and basic business references.

The consultant also prepared and disseminated educational materials to DBE firms.

And it assisted the Office of Minority Business Enterprise in monitoring and attending project showings with clients; in the promotion of working relationships between prime and DBE contractors, and in assessing the business needs of DBE and WBE firms engaged in highway construction.

The Department of Highways and Transportation is using its fiscal 1985 federal allocation for supportive services to contract with Scientific and Commercial Systems Corporation of Springfield, Virginia, a minority-owned financial and construction consulting company.

Under this contract, the consultant will attempt to improve management and technical capabilities of disadvantaged firms by designing, developing, and conducting 12 workshops on highway construction marketing, management, and contract law; basic plan-reading, and basic box culvert construction.

At least 40 DBEs will be assisted in the area of project management and cost control, and 15 firms will be helped in such areas as preparation of loan requests, bonding packages, and development of business plans.

These supportive services in Fiscal 1985 will, in many respects, address needs identified during the initial assessment in the past year. This is significant in that follow-up monitoring will be conducted to determine the growth and viability of DBE and WBE firms included in this program.

The third broad area toward which the Commonwealth's efforts have been directed is that of enforcement in respect to individual contract and overall program compliance. I want to turn now to that area.

Enforcement is achieved mainly through requirements and procedures established in contract specifications and special provisions, through associated administrative directives, and through contract monitoring.

Appropriate DBE goals are set for individual contracts before they are advertised for bids.

This process includes a determination of potential subcontracting opportunities on a project-by-project basis; a comparison of all projects to be advertised in a given month; the anticipated total bid advertisements for the fiscal year, the results of contractor commitments from prior advertisements, and the availability of DBE contractors in the geographic area of the project.

A decision as to compliance of the low bidder is made, of course, before the award of a contract.

This decision may result in contract award; in conditional award on "good faith effort" with no reduction in required DBE participation, or in rejection of the bid and enjoinment from further bidding for a period of 90 days.

I would emphasize that the award of a contract on the basis of "good faith effort" in no way relieves the successful bidder of the responsibility to achieve the full DBE participation assigned to the project.

After the award of a contract, project inspectors in the Department of Highways and Transportation are responsible for monitoring compliance and DBE participation. Their findings are reported through the department's field offices to the central office Construction Division and Equal Employment Opportunity Division.

The staff of the EEO Division has been expanded from five to nine to allow formation of a full-time compliance review team to investigate complaints and other allegations of improprieties in the DBE program. The department's Construction Division will continue to be responsible for all facets of contract compliance while the EEO Division will act to perform in-depth compliance audits on contracts and to report on the contract compliance performance in the Construction Division.

In addition, monthly reports from prime contractors and subcontractors provide detailed information as to DBE work on each project. Prime contractors and DBEs are also required to certify the amount of money committed for the performance of subcontract work.

Sanctions for non-compliance or for failure to accomplish required DBE participation are established clearly by special contract provisions.

In the pre-award stage, non-compliance includes failure to submit the information needed to ensure DBE participation or to determine the acceptability of good faith efforts. As I have indicated, the sanction for non-compliance at this stage is rejection of the bid and enjoinment from further bidding for 90 days.

In the post-award stage, projects are monitored at specific points while in progress and upon completion. Failure to comply with the contract at any point in this process may result in enjoinment from bidding until DBE participation is achieved or, in the case of completed projects, for 90 days.

A panel which includes the director of the Office of Minority Business Enterprise and administrative officers of the Department of Highways and Transportation has been appointed to hear and decide contractors' appeals. A representative of the Attorney General's Office advises the panel.

The Highway and Transportation Department is also developing a computerized management information system to track virtually every facet of DBE utilization. We anticipate the system will be fully operational by January 1, 1985.

The program will reflect DBE participation by state and Federal fiscal year, by month or any combination of months, by individual contract, and by individual contractors.

It will also include information as to the state's contract goals or requirements; the contractor's up-front commitment, and actual versus planned DBE participation month-by-month. This data will be available for individual contracts or for practically any imaginable combination of contracts.

As of July 31, 1984, 350 DBEs had been certified.

Twenty-nine applicants have been denied certification, seven have been decertified, and eight have appealed their denials to the U.S. Department of Transportation. The state action has been upheld in three instances, reversed in one, and four cases are pending.

In Fiscal 1983, of the $238 million in federal aid available to Virginia for contracting opportunities, $17.2 million—or 7.2 per cent—was awarded to DBE's.

While this was somewhat short of the targeted 8.3 per cent goal, I would point out that during this period our appropriate state officials were reviewing, modifying, and developing policies and procedures to reflect the requirements of section 105(f).

Those efforts are proving successful, certainly, to this point.

In the first 10 months of Fiscal 1984, Virginia awarded highway contracts involving $127.2 million in federal funds—and $23.5 million (or 18.5 per cent) went to DBE's. This sum included approximately $9 million to DBE prime contractors and about $14.5 million to DBE subcontractors.

We expect the total DBE participation will have exceeded 15 per cent at the close of the current fiscal year.

I would be less than candid if I were to imply to you that the DBE program in Virginia has progressed without problems. It hasn't.

There has been, of necessity, a period of internal adjustment calling for development of new procedures and, in some respects, of new attitudes.

There have been allegations of inappropriate work relationships between prime and subcontractors, and of certified DBE firms not truly being genuine DBEs. Every such allegation is being investigated thoroughly by the department and, when necessary, the office of the Attorney General is assisting in these inquiries. We will not knowingly tolerate abuse of the program.

There is a further concern having to do with the limited number of viable DBE companies capable of performing work in highway construction.

I have outlined many of the steps being taken to encourage increased participation, and to assist firms in becoming qualified to share more fully in the program.

As a further step, we are now carefully considering the concept of a mentor/protege plan which we hope will be an additional help.

Since 1983, Virginia has used a contract provision allowing compensation to the prime contractor of up to 15 per cent of the dollar amount paid to DBEs for expenses the prime incurs in providing training and other assistance to the DBEs.

This compensation has covered, but has not been limited to, the expense involved in obtaining price quotations, analyzing plans and specifications, and planning and management of work.

We believe a more formal mentor/protege program may accomplish several objectives.

We believe it could lead to growth in the capacity and capability of other small, existing firms, and encourage DBE firms, including those in other construction disciplines, to seek opportunities in highway work.

Only time will provide the true test as to the long-term effectiveness and success of all of these efforts. I believe time will judge the Commonwealth favorably.

Full compliance with section 105(f) of the Surface Transportation Assistance Act of 1982 is a matter of first priority not only for our Department of Highways and Transportation and Office of Minority Business Enterprise. It is a matter of first priority, as well, for the Governor of the Commonwealth.

Mr. MITCHELL. Thank you very much. I think it is because of proximity that I am interfacing most frequently with Maryland contractors, Maryland minority business people, and Virginia minority business people, and I hear a constant complaint from the Virginia minority business people that you do not require your primes to name subs at the time the bid is submitted, is that correct?

Mr. KING. That's right. We give them time after we open bids. We review those bids for several reasons. It takes about a week's time, antitrust claims, these kind of measures. Then at the end of that period we readvise the contractor that he is the apparent low bidder. Then he is given 30 days to name the DBE's on that contract before we award that contract. We tell him he is low bidder, but we do not award that contract until he indicates that he has that DBE for us, whatever percentage we placed on that project.

Mr. MITCHELL. That would be OK provided you monitor the performance periodically during that contract. It is possible for the guy to say I picked up Mitchell Excavation Co. as a sub at the time the contract is awarded, and then 3 months later he advises me, I don't need you anymore; and he might have signed, but that is not really compliance. How do you monitor that?

Mr. KING. Mr. Chairman, as I was indicating, in my prepared text we do have that monitored by our project engineer on that project. If he sees any problem at all, that is when he calls in whatever assistance that he might call in. We have not experienced any problem in that area.

Mr. MITCHELL. I am on the House Committee for Banking. I am always very worried when they come up with these new animals. Some years ago there was UDAG, and now there is HODAG, and we had CBDG, and I finally got to know them all, but these new ones scare me. Again, I heard of this mentor protege concept. Do you know anything about that?

Mr. KING. Yes. In fact, we are looking into it right now and working on trying to establish guidelines for such an arrangement.

Mr. MITCHELL. What is it?

Mr. KING. It is when a contractor takes a minority classified as a DBE into his firm to carry him through the process to teach him how to bid; to read specifications, learn how to manage certain contract work under the umbrella of that prime.

Mr. Chairman, I can say, and this is in discussion we've had around the State, this is some of our minority primes today. That is the way they started and indicated some conflicts that we had with the contracting industry that one indicated in a Fredericksburg firm it took him 7 years before he felt comfortable in bidding one of our projects as a prime. We think it is just an additional thing that we should look at carefully to see whether it will assist in developing additional DBE firms in Virginia.

Mr. MITCHELL. I want to make sure I understand this. I am socially and economically disadvantaged, so take your time. This protege goes with the prime. He is a student, he is a learner. He doesn't own anything in that prime's company. He is there merely as being tutored. Can that prime take credit for your goals and meeting minority business?

Mr. KING. I think those are some of the things we are wrestling with, Mr. Chairman, right now.

Mr. MITCHELL. Why do you have to wrestle with it? The answer should be no. The answer should be no because the law says you are dealing with minority businesses, and I think the program laudatory. If that's the way it works, somebody takes you under their wing and says we are going to help you learn how to run a business, that's great. That is on the job business training program, but don't count that because you will be breaking the law. The law says this must go to minority businesses, or whatever you are calling them now, DBE's, and no prime should be given credit for that. It's an extra effort which is of enormous significance. It can be of great value. I raise this question about the New York program because apparently New York is counting this tutorial program as part of reaching the goals, and that violates the law.

Let me ask a couple of other questions about this. I have to put it under the microscope.

You are considering such a program in Virginia?

Mr. KING. Yes, Mr. Chairman, we are, but I think we are wrestling with many of the different facets, and I think we are going to be watching the Federal Highway Administration to see what kind of guidelines comes out of the Federal Highway Administration. That is what Mr. Evans of South Carolina is suggesting is that joint effort by AASHTO. We are asking the Federal Highway Administration to issue some guidelines on the mentor protege.

Mr. MITCHELL. Back to my excavation company again. I am learning how to be an excavator, and I go with this mentor company and they teach me all these good things, and 5 or 7 years later I go out on my own. How do you prevent a situation in which that kind of relationship has been nurtured over 5 years from turning into a front company?

Mr. KING. I think there has to be a time constraint as to how long this goes along. It might be on this project and then hopefully that person would move off and handle a project on their own.

Mr. MITCHELL. The time factor is really not my problem. This is my big brother who has tutored me and after I have graduated, because of that relationship, can he come to me 7 years later and say: "Now, look, Mitchell, I helped you along and there is a contract for minorities that you are not able to handle, but I will put it in your name and in actuality you will front for." Do you see the danger I am talking about?

Mr. KING. Yes.

Ms. MOSS. I would emphesize that our mentor protege program is merely a concept at this point.

Mr. MITCHELL. Examine it very carefully please.

Ms. MOSS. The Governor has asked that we examine it very carefully, talk with members of the minority community as well as the nonminority contractors from the industry prior to taking any steps to formalize such a program.

Mr. MITCHELL. You break your awards down by categories; is that correct?

Ms. MOSS. By categories? We do not break them down in that manner. I think that we have the ability to do so. We have not done this in the past primarily because our reports are not in that format.

Mr. MITCHELL. You must do that. Otherwise, you get a completely distorted picture of how you are helping minorities. I am not at all racially chauvinistic. I would be greatly distressed to see that 98 percent of all the contracts went to blacks. That would distress me greatly because I am not racially chauvinistic. I want everybody to share. I am being facetious now, but let me be serious. You can't give an accurate picture unless you break it down. It is possible for a strong movement in one section of the country to get the total lion's share of the dollars, and you aren't helping the overall minority business development.

Finally, in your achievements in 1983 and 1984, do you count awards, commitments, or both?

Mr. KING. Both.

Mr. MITCHELL. Don't do it. Don't do that. That is not being diplomatic on my part at all. Why do you do it?

Mr. KING. Our contract provisions require that contractor to produce that percentage in that contract.

Mr. MITCHELL. In that year?

Mr. KING. In the life of his contract. Some contracts are 6 months, and the majority are 18 months.

Mr. MITCHELL. That is the nub of the problem because you report to DOT and DOT reports to us that you have achieved 14 percent in actual awards to DBE's in 1984, but you really didn't. You achieved maybe 3 percent in actual award dollars and the balance is in terms of commitment. That won't buy the equipment that your subcontractor needs. Do you understand why I have such a problem with this?

The other argument that has been advanced is some contracts spill out over 4 years, and it is in the fourth year that the prime can really use those DBE's. It is at that phase of the work where he can maximally use them. I have no problem with that if that actual use is counted in that fourth year, but to count it in the first year as a commitment is really misleading. I urge you to reconsider that.

Mr. KING. Mr. Chairman, I think we have a record of that, but those dollars are allocated on a yearly basis, and we are dealing with this fiscal year and the amount of contract administration for this fiscal year of those DBE firms that will get a certain percentage of that work.

Our experience is we aren't failing in any of those contracts yet. Now, we have not awarded contracts to low bidders like some of the others that have not shown us that they can fulfill this contract, and we have a panel that can handle that, that he can seek recourse from. But it is our experience to date that we haven't had any reneging on that part. Now, we are going to have a record so that we can tell exactly how much disadvantaged business is going on all of the time. That will be on our computer and we will be able to pull that out.

Mr. MITCHELL. On your 1986 income tax I make a commitment that you can show a $2,000 contribution from me for your having to come to testify. You can report that on your next income tax. However, that commitment is not going to be good until 1988. I am not going to pay you until then. Do you see what the problem is?

Mr. KING. Not exactly.

Mr. MITCHELL. I understand how your contracts are awarded, how the money comes in. I am saying that it is wrong to say that we have actually given to DBE's in 1984 *x* amount of dollars when you are not really giving them *x* amount of dollars. You give them *x* amount of dollars of 1 percent and a commitment, and that doesn't buy the bread.

Mr. King. What we are doing is we are complying with the existing procedures for reporting.

Mr. Mitchell. What you must do when reporting is to break it down on your DBE goal; *x* amount of this is a commitment, and *x* amount is actual award. That is the only fair way. Otherwise, you get a completely distorted picture.

Tell Governor Robb I send him my best regards. Some members of my family are very close to him, and I have a great deal of admiration and respect for him.

Finally, the last comment on this thing that distresses me so about commitment. People have heard me talk around the country and I say the last good faith effort was Jesus. There hasn't been any good faith effort since then, and the statute says 10 percent, that there must be an actual dollar amount of 10 percent on a commitment. Thank you for being so patient.

Is Mr. Oscar Wright here?

Mr. Wright. Yes.

Mr. Mitchell. Thank you. We will hear from Oscar Wright, Executive Director, Office of Small Business, Department of Commerce.

TESTIMONY OF OSCAR WRIGHT, EXECUTIVE DIRECTOR, DEPARTMENT OF COMMERCE, OFFICE OF SMALL BUSINESS, STATE OF CALIFORNIA

Mr. Wright. I would like to apologize to you. We were late getting the testimony in and there was some internal considerations in California that have somewhat precluded that. We were not sure who was going to make the testimony this afternoon. Another party from Caltran was to join me here this afternoon, but she was delayed due to illness. I was informed this morning in my room, so I have to proceed alone.

Mr. Mitchell. I must say unfortunately I have not read this testimony. I will read it, but in order to expedite the hearings, if you will just summarize giving us the high points rather than reading the entire narrative.

Mr. Wright. As the State director of the office of small business, serving at the pleasure of Gov. George Deukmejian, I can assure you that our administration, working through the State department of transportation, is, and will continue to be, steadfast in our efforts to increase the participation of disadvantaged business enterprises. Part of our State policy involves an aggressive program designed to increase the utilization of minority and women on Caltrans construction, procurement, services contracts, and local agency Federal-aid construction contracts, specifically the Surface Transportation Act.

California's disadvantaged business and women business enterprise programs are affirmative action programs designed to achieve specific goals both annually and on a contract-by-contract basis. California's goals for MBE and WBE participation on FHWA funded projects for fiscal year 1983–84 are 13 and 3 percent, respectively. Our State department of transportation, Caltrans, is proud to announce that as of July 1984, DBE's have received awards totaling $63,487,103 or 15 percent. WBE's have received awards totaling $12,068,474 or 2.9 percent. Although we have exceeded our projected goals to date, we will continue in our efforts to sustain fair share contract opportunities for our DBE's and WBE's.

In this committee's correspondence to Governor Deukmejian, dated August 10, 1984, you indicated four major problem areas that have been identified that confront DBE's. I will deviate from the text and give you a highlight of those areas. The main problem we found in California over the past few years has been one of bonding and financial capacity for minority contractors. One of the programs that we will initiate immediately on Friday by contract form will be a bonding loan guarantee program for minority contractors. The Federal Highway Administration has allocated, or will allocate, $2.7 million for that endeavor. My office will provide some matching funds totaling $3 million.

Now, that money will be provided to the Century freeway project in Los Angeles, but we intend to expand that bonding program throughout California in the next year or two. So that is one of the areas that we realize was a problem with our minority contractors, and one that we have attempted to address.

In reference to prequalifications, we do not in the State of California have a prequalification program as of this date. We feel that it is cumbersome, it is too much paperwork, and that in many instances there can be gross abuse in terms of not qualifying minority contractors with a prequalifying process. So we do not have that type of system. We do, however, have a very stringent certification process. We want to know if in fact a DBE or WBE is bona fied and valid. We look at more than just one area, of course, not just ownership of that firm to determine the minority ownership, but also control who actually controls that business. It should be in our estimation 50 plus 1 percent minority ownership and control, and I emphasize control because we go through a great deal of trouble to look at the documentation in the certification process, the financial statements, the 1040, résumés, trying to determine the experience level of that contractor and whether in fact he does control that bid and runs the day-by-day process and operation.

Regarding technical assistance, we have contracted with a Statewide minority firm, Technical Data Corp., to provide not only services relative to education and seminars, but also recruitment and referrals as well as implementation enforcement. This firm has three offices throughout the State of California and they operate within all 11 district offices. Basically what they do is provide information as well as preaward services to minority contractors to make sure they are prepared for the job that they may eventually get, but even more significantly, to disseminate the information that these projects are available, these contracts are available, not only solicitation of prime contractors for subcontractors, but also subcontractors for primes. So it works both ways.

Let me add California had a serious problem in terms of getting the money out early on in the new administration. I believe that to date through the Surface Transportation Act, we have received about $835 million. Of that amount, and I think this is on the last page of the testimony, it states that approximately $400 million was subject to minority participation. Again, of that amount we have received, 15 percent has gone through DBE's and 12 percent to WBE's. The question may be asked, it is only half the amount that was allocated? Again, when this administration came into being about 18 or 20 months ago, we did not have what we felt was an accountable infrastructure that would serve as a conduit for those kinds of activities, so we have structured one as such. We now have a chief liaison officer, we have engineers in our local district offices who are primarily responsible for the implementation of the program. So we have it on a fast track to get these moneys out.

To date we have done quite well. We have exceeded our goal. We hope that by the end of this year 18 percent of disadvantaged businesses would have received awards from the program itself.

Mr. MITCHELL. Let me interrupt you for just a minute. Have you lost that balance? You've got $854 million, and you actually have only gotten out as of July $422. Have you lost the difference?

Mr. WRIGHT. We have not lost the difference, and that should account for the increased participation in the latter part of this fiscal year for the utilization of that money exceeding our goals.

Mr. MITCHELL. You can get the $412 million out between July 8 and the end of the fiscal year which is October?

Mr. WRIGHT. It is projection. It is definitely a goal that we hope to obtain.

Moving beyond that point, I need to touch on a few other areas here. Our data base. You've asked the question, and I was fortunate enough to sit through this. I listed some of your ticklish questions and it gave me a chance to prepare my own response on this. It may not be totally accurate. We do have a data base just recently developed that is capable of providing 400 bits of information. It is broken down. This is certified DBE's and WBE's. It is broken down by ethnicity as well as the areas that these potential clients would like to serve, whether they are female or whatever the situation might be and what county they might be involved in. We have that information on a certified list, and I brought a copy of it to show you. It should not be difficult for us at this point to extract that information and to have a category breakdown by ethnic group. We hope to have that done before the close of this year. We have already collected the information so it is just a matter of running it out and making it available. So it is a good faith effort I guess, but we certainly have the information and potential.

Mr. MITCHELL. Are you finished?

Mr. WRIGHT. Yes.

Mr. MITCHELL. As of right now you can't give me a breakdown on ethnicity in terms of the 15 percent that has gone out so far this year?

Mr. WRIGHT. Yes, we could. I could not provide it to you today, but we can provide that information. Yes.

Mr. MITCHELL. But you could not have done that for 1983?

Mr. WRIGHT. I don't know if the documents were compiled in 1983. I think those reports would be forthcoming. They probably were not ready for dissemination before July, but I am sure they are now and they will be in document form.

Mr. MITCHELL. You sat through the entire hearing. Do you count commitment?

Mr. WRIGHT. No. The amounts that are provided to you are actually only dollar awards.

Mr. MITCHELL. You just won a gold star.

How long does it take you to certify your DBE's?

Mr. WRIGHT. On an average 3 weeks to a month.

Mr. MITCHELL. Is New York still here? That is their problem. It is 9 months. They are taking remedial action.

Mr. WRIGHT. This is one of the reasons we did not endeavor to participate in any prequalification program.

Mr. MITCHELL. That speeds up the process.

Mr. WRIGHT. We felt that intensive effort on the front end.

Mr. MITCHELL. Do you have problems with fronts?

Mr. WRIGHT. Sure we do. I am sure most everyone who has testified has had problems.

Mr. MITCHELL. How have you dealt with them?

Mr. WRIGHT. Basically through the implementation and compliance. One of the things that I have taken notice of, and I have only been with the administration just shy of a year and a half intermittently in and out of this area, we have a local office of labor compliance, as well as a local office of engineers, and it is their responsibility to monitor that process to see who actually does the work, not only preaward, but during the process. They do that by looking at the payroll, the payroll certification to see who was actually paid and how and for what period of time, and by whom. It goes up from the district office to the engineers to the office of civil rights. We made them change it in the last couple of weeks. Previously we had our office of civil rights reporting to another director, a deputy. That is no longer true. That person now reports directly to the department of transportation directly and investigations can be initiated by any DBE or WBE, or any third party and we would have a resolution on that within 30 to 45 days. That is our goal. We don't always meet it.

Beyond that point, I would like to speak informally on another matter that is really dear to me. I have a great deal of respect for Gov. George Deukmejian, and I think one of the reasons is a little story that happened a couple of weeks ago.

I am not involved directly in the everyday process. Ms. Barn is aware of that situation. However, we have 400 small business people coming together. We have one particular contractor that happened to be blind who went directly to the Governor during the luncheon and mentioned that he had a problem, not only the fronts, but some other areas as well. The Governor at that point did not go back through the system. He called me in. I am not even a part of that investigative system. He asked me to fly to Los Angeles to meet with this particular trucking association, and I spent 3 hours last week and 6 o'clock Wednesday morning on the phone with these people. I now have what their problems are. Those concerns will not go back through this system per se. They will go to the Governor's office, and he in turn will filter through. I can appreciate that because you can't always move things through bureaucracy. I think the Governor has realized that, and at some point we will have to focus on Caltrans and how we are going to deal with that problem. I think it is an indication of this Government's commitment.

Mr. **Mitchell**. You have a very fast certification process. Am I right in assuming that you don't have any waiting list of people to be certified?

Mr. **Wright**. Not to my knowledge. I don't see any lines.

Mr. **Mitchell**. You are not really in the operation?

Mr. **Wright**. No. I don't know of any waiting list.

Mr. **Mitchell**. To the best of your knowledge there is no backlog?

Mr. **Wright**. Not to my knowledge, but I could certainly get back to you expeditiously.

Mr. **Mitchell**. One last question from me. How do you handle the problem of—I won't say Bectel—but a big firm like that has a job and they get to your people and say we just can't find any DBE's to use on this contract. How do you handle that kind of a problem?

Mr. **Wright**. It is very simple. If you cannot locate any DBE's, then we cannot locate a contract. I don't think that is any problem that we have had any great deal of experience in dealing with. Let's say that someone would come to this particular office and make that statement. We then want to know what have you done to find DBE's, and what that simply means is, and I won't use the word good faith effort again, but what actions have you taken? Have you gone to presolicitation meetings? Have you advertised in trade association journals? Have you gone to seminars that minority participants were accessible to?

Mr. **Mitchell**. Would you punch out for them a series of firms? Do you have this data base information?

Mr. **Wright**. Yes. That is why we are developing it by county as well. We can give him a new charge, a list of certified DBE's that he can use. There must be a minimum, at least three qualified DBE's in every one of our Caltrans districts. But we will provide the list to him and then work with him to achieve that goal.

Mr. **Mitchell**. Sounds good. We sit here and pass these laws, and we have the hearings to see if they are working. It sounds very good.

Mr. **Wright**. I am very positive. There is dedication in California. Again, I go back to Gov. George Deukmejian. It goes directly to him. He is definitely a man of integrity. He appointed me as State director of small business and I didn't really have the background to be quite frank about it. I was in Los Angeles and had run for the State senate, and he felt I had the sensitivity. That was more important to him. He could always find qualified people to support me, but we needed someone to be active in compliance, and so I am proud to be in it. It is broadening my scope, as you can see. That is why I am here today.

Mr. **Mitchell**. It is going to be interesting. We are going to have another set of hearings early next year which will cover 5 more States; then we will be finished with the States. Next we will have hearings involving the minority businesses themselves, the various trade associations will come in, the black businessmen of Los Angeles.

Mr. **Wright**. I am quite familiar with them.

Mr. Mitchell. We will take testimony from them, and we will then match all of this together so we can get an accurate picture of compliance.

Mr. Wright. What we might want to do is coincide that with another endeavor that we are now planning and that is we are going to get a new advisory group of small and minority contractors. We would like to get direct input from them as opposed to going through the primes and the Government agencies. So this advisory group or council will be a permanent fixture in our bureaucracy, and perhaps we can tie that in with making those names available to Ms. Bryant in your office.

Mr. Mitchell. I know them. Thank you very much.

[Mr. Wright's prepared statement follows:]

Prepared Statement of Oscar Wright, Executive Director, Department of Commerce, Office of Small Business, State of California

On behalf of Governor George Deukmejian and the State of California, I would like to extend my appreciation to the Congressional Committee on Small Business and for the opportunity of discussing with you the implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982.

As the State Director of the Office of Small Business, serving at the pleasure of Governor George Deukmejian, I can assure you that our administration, working through the State Department of Transportation (Caltrans), is and will continue to be steadfast in our efforts to increase the participation of Disadvantaged Business Enterprises. Part of our State policy involves an aggressive program designed to increase the utilization of minority and women on Caltrans construction, procurement, services contracts and local agency federal-aid construction contracts.

California's Disadvantaged Business and Woman Business Enterprise programs are affirmative action programs designed to achieve specific goals both annually and on a contract by contract basis. California's goals for MBE and WBE participation on FHWA funded projects for FY 83-84 are 13 per cent and 3 per cent respectively. Our State Department of Transportation (Caltrans) is proud to announce that as of July 1984, DBEs have received awards totalling $63,487,103 or 15.0%. WBEs have received awards totalling $12,068,474 or 2.9%. Although we have exceeded our projected goals to date, we will continue in our efforts to sustain fair share contract opportunities for our DBEs and WBEs.

In this committee correspondence to Governor Deukmejian, dated August 10, 1984, you indicated four major problem areas that have been identified that confront DBEs and impact on their level of participation and the amount of Federal funds they receive under the Surface Transportation Assistance Act. Those areas are (1) barriers such as bonding, prequalification and licensing; (2) the availability of technical, financial and other supportive for new and existing firms; (3) efforts being made by each recipient to inform disadvantaged businesses about specific contracting opportunities and (4) enforcement mechanisms used by each State to insure the participation and utilization of DBEs.

In the remaining minutes of my presentation, I would like to address the aforementioned concerns.

PROBLEM AREAS

1. Barriers such as bonding, prequalification and licensing.

(a) Bonding: Currently we are putting together a bonding program which is specifically designed to service those firms which contract in the Century Freeway area. The bonding is for the purposes of bonding smaller construction firms which typically do not have access to or cannot be bonded to the capacity necessary. We are considering instituting a pilot statewide bonding program. We will do this when FHWA funding becomes available.

(b) Prequalification: Currently this State does not have any prequalification process which it undertakes in order to certify DB/WBE firms. Prequalification processes such as review of financial capabilities, bondability, etc., are not conducted by Caltrans.

(c) Licensing: In order to bid and secure highway construction work, an individual in most instances must be a licensed contractor. Obtaining licensing, however, can often be time consuming since it requires a number of years of experience before licensing will be granted. Additionally, licensing may be used to create fronts (DB/WBE firms) by prime contractors. On occasion, a prime contractor will be the holder of a license and service as the Responsible Managing Officer (RMO) of a particular DB/WBE firm. The DB/WBE will then appear as the licensee, under that license, and perform work he/she secures through a licensed prime contractor. The use of licensing in this manner allows the certification process to be subjected to abuse. There is a very extensive review and analysis of certification when these kinds of indicators of possible fronts are present.

2. The availability of technical, financial and other supportive assistance for new and existing firms.

The State of California through a support service contract, Technical Data Corp. (TDC) provides support service assistance in the form of technical assistance. TDC is charged not only with the technical assistance but also with the responsibility of seeking out and referring new firms to be certified as DB/WBEs. Additionally, TDC conducts workshops that provide training on the financial aspects of bidding and maintaining a firm's solvency.

In addition to the technical and financial assistance provided by TDC they also assist new firms in securing DB/WBE certification. They are charged with the responsibility of researching a firm's background and assisting in filling out the DB/WBE's application.

3. Efforts being made by each recipient to inform disadvantaged businesses about specific contracting opportunities.

While there is no specific advertisment regarding contracting opportunities sent to DB/WBEs the contracting opportunity information is available to the public. In addition, the Office of Civil Rights provides assistance and often appears as a speaker at minority and small business conferences to facilitate the dissemination of information regarding contracting opportunities with the Department of Transportation (Caltrans). Also, the support services contract funding requested from the Federal Highway Administration, (FHWA), for fiscal year 84-85 contains a request for funding to provide substantial outreach to DB/WBEs. It is anticipated that some six major outreach efforts will be conducted.

The Office of Civil Rights is also organizing an Advisory Council made up of disadvantaged minority and women owned businesses to help Caltrans understand better the needs and concerns of the small business community. This program is targeted for implementation in the new 84-85 fiscal year and funding for this program has been requested.

4. Enforcement mechanisms used by each State to insure the participation and utilization of DB/WBEs.

The Department of Caltrans has specifically provided that all contracts that are let by the State of California will have a minimum of 3% goal of them. The mechanism currently in place provides assurance that the goal is met and the participation and utilization of DB/WBE take place in the charge of the Civil Rights office. The Civil Rights office reviews all contracts for specific contract opportunities and sets goals on each contract. The contracts may be monitored in a preaward conference setting or may be evaluated for good faith efforts that prime contractors have made. The Office of Civil Rights has on occasion recommended denial of award to the first low bidder on the basis of nonresponsiveness to a good faith effort. Additionally, there is a revamping of the special provisions in each contract which specifically spell out what constitutes good faith efforts when the goals for each contract are not achieved. The Office of Civil Rights in conjunction with the Office of Engineer has put together and has conducted four seminars informing contractors as well as informing DB/WBEs of their responsibilities and their need to assure the participation of the DB/WBEs in award of contracts.

The above was provided as a reference and basic background information on the four major problem areas that the committee will be focusing in on. The remaining six questions referred to in Mr. Mitchell's letter that the committee will investigate are answered below:

(1) California's certification process and how it addresses program abuse.

The certification procedure the State of California follows is a desk review of firms desiring to be certified, and is an in depth analysis of DBEs/WBEs written application and documentation. It should be noted that California certification process addresses program abuse in a pro-active manner. For example, there are three basic types of ownership, they are: (1) sole proprietorships, (2) partnerships, and (3) corporations. In each instance, several pieces of documentation are required to assure that the controlling interest and the day-to-day operation and management of the firm is by a disadvantaged male or female.

Under sole proprietorship the following documents are required by the Office of Civil Right's staff:

1. A current financial statement prepared by an independent CPA or accountant.
2. Current federal tax form 1040.
3. A resume for the sole proprietor, superintendent, foreman, and/or supervisor showing education, training, and employment with dates.
4. Equipment rental and purchase agreements.
5. Management services agreement.
6. Applicable licenses and/or permits.

For a partnership the following information is necessary:

1. Current financial statement prepared by an independent CPA or accountant.
2. Current federal tax form 1065.
3. Resume of all partners showing education, training and employment with dates.
4. Partnership agreement.
5. Buy-out right agreement.
6. Profit sharing agreement.
7. Proof of capital invested.
8. Applicable licenses and/or permits.

For corporation the following information is required:

1. Current financial statements prepared by an independent CPA or accountant.
2. Current federal tax form 1020s and 4562.
3. Resumes of principals, showing education, training and employment with dates.
4. Articles of incorporation, including date approved by State.
5. Minutes of first corporate organizational meeting.
6. Minutes of board meetings for the past two years.
7. Corporation bylaws.
8. Copy of stock certificate(s) issued (not a specimen copy).
9. Stock transfer ledger.
10. Proof of stock purchase.
11. Copies of third party agreements or management service agreements.
12. If a foreign corporation, a copy of authority to do business in California.
13. Copies of the following:
    a. Stock options,
    b. Ownership agreements,
    c. Restriction on the disposal of stock loan agreements,
    d. Stockholder's voting rights,
    e. Ownership of voting securities, and
    f. Facts pertaining to the values of shares.
14. Applicable license(s) and/or permits.

(2) California's procedures to insure compliance with Section 105(f) regarding BD/WBE participation.

As noted above there are a number of pieces of information that are requested from potentially certifiable firms. In addition to the review of the above documentations, site visits are conducted to assure compliance and confirmation of DB/WBE status. An extensive DB/WBE planning process has been put together by the Office of Civil Rights and its process for certification of Disadvantaged Business and Woman Business Enterprises and is contained in a DB/WBE program booklet entitled "Disadvantaged Business and Woman Enterprise Program for California Department of Transportation (Caltrans)". In addition to the above, the State of California also has a support services contractor, Technical Data Corp. (TDC), which often works hand in hand with this office to assure compliance with applicable laws. TDC may often times review potential DB/WBEs and intercede in situations where DB/WBEs need assistance or additional information.

(3) California's management information system for collecting and compiling data on DB participation under the Act.

California currently generates a computer run data system which contains the certified DB/WBE for the State. This certification listing has the certified firms, the person to be contacted, the type of work conducted by the firms, certification expiration dates and percentage of disadvantaged woman and business enterprises that the firms should be credited at. In addition, the department also has a breakdown of locations these businesses are willing to perform work in. California is currently in the process of utilizing a much more comprehensive data collection system. It is anticipated that this data will be of tremendous use and utilized by other entities within the State department. The data system will be able to compile, for example, the following information.

The ethnicity of firms, by county or desired work location, the percentage DB/WBE makeup, the specific type of work the firms conducts; the total number of DB/WBE is in a given category of work by location.

(4) Other problem areas you have identified that impact DB participation and performance in California.

Other areas of concern that we have had with DB participation in California are:

a. Bonding and lack of sufficient bonding to assure DB/WBEs can perform.

b. Businesses which are held out to be DB/WBE owned and directed and are really fronts for prime contractors.

c. Sensitivity to DB/WBE program by prime contractors—good faith effort.

(5) The total dollar amount of the funds appropriated by DOT to California under the STAA of 1982 for fiscal years 1983-84.

Those total funds are 835.4 million.

Of the above amount $458,748,961 were subject to DB/WBE goals.

(6) The amount of that total that California has used to provide contracting opportunities for DBs for fiscal years 1983-84.

The total amount as of July 1984, that has been appropriated for DB/WBEs both federal and state are $80,500,177. Federal only $75,555,577, State only $4,944,600.

Mr. MITCHELL. Now my patient friend from the District of Columbia, Mr. Horace Jones.

TESTIMONY OF HORACE JONES, ADMINISTRATOR, DESIGN, ENGINEERING AND CONSTRUCTION ADMINISTRATION, DEPARTMENT OF PUBLIC WORKS, DISTRICT OF COLUMBIA

Mr. JONES. I will attempt to be brief. We are glad to respond to your invitation to participate in the committee's hearings.

The District's own law governing the certification of minority business enterprises was promulgated in 1976 and amended in 1980. The Minority Contracting Act requires minority participation in the District's procurement opportunities in much the same manner as the Surface Transportation Assistance Act of 1982. For this reason, the District has a clear advantage over those jurisdictions which are implementing minority/disadvantaged business enterprise programs for the first time with the advent of the Surface Transportation Assistance Act.

The District of Columbia is proud of this record in the area of minority participation. The 1982 Minority Business Opportunity Annual Report reflected that the percentage of department of transportation, now the department of public works, construction contracts awarded to minority firms was 71 percent for the period of October 1, 1981, through September 30, 1982, prior to the implementation of the Surface Transportation Act.

Mr. MITCHELL. I was about to interrupt you because we are dealing with the Surface Transportation Act. That was before the act went into being.

Mr. JONES. Our department of public works, in its implementation of the Surface Transportation Assistance Act, has mandated that 35 percent of its total dollars be awarded to disadvantaged business enterprises and 2 percent to female-owned business firms. District regulations exceed Federal law in both goal attainment and its application to all contracts, regardless of the existence or level of Federal funding participation. Extreme care is exercised to ensure that program abuse does not exist in the department's DBE program and that the benefits of the program accrue only to legitimate disadvantaged business enterprises and women-owned firms.

The District utilizes a sheltered market approach in its procurement process. If within the design phase, at least three qualified

DBE/WBE firms are identified which can perform the contract, then the project can be sheltered for DBE bidders only. Therefore, through the subcontract provisions of the open market approach and the sheltered market procurement process, the District is assured of achieving its DBE/WBE goals. For instance, we are in the throws of a major procurement signal replacement system for this city. We are going about replacing 1,280 intersections in the city, the largest signal procurement ever undertaken in this country in the range of $35 to $50 million, and we have beaten the Feds over the head and they have agreed and we have stipulated in that procurement that 51 percent of the dollars will go to DBE's and WBE's, and they have agreed, and we expect open bids on that contract around January 1 of this coming year.

Mr. MITCHELL. Is that utilizing Surface Transportation Act money?

Mr. JONES. Yes. And we are very proud of that record.

To date, the District has not fully computerized its management information system to effect the immediate retrieval of all data relative to DBE's, and the ethnicity of the DBE's, but the data is available and we can retrieve it by other means.

Mr. MITCHELL. I think that should be lesser of a problem for the District than for the various States.

Mr. JONES. It is a lesser of a problem, and there are some problem areas which would be pointed out. There has been resistence on the part of non-DBE prime contractors to subcontract portions of the contract to DBE's and WBE's, and parttime contractors attempt to circumvent the spirit of the Surface Transportation Assistance Act of 1982 by claiming a good faith effort.

I must reiterate here that being neither fish nor fowl here in the District, we are not a State, we are not a county, but we are a city, and in the end we are all three. The contractors here tend to go directly to the Feds and tell the Feds that they have made a good faith effort, and the Feds come back to us and we try to beat them over the head and try to get us to acquiesce and say the contractors have made a good faith effort, and we don't believe they have. It is becoming a problem to us here.

Mr. MITCHELL. Yours is a unique circumstance. How does the administration at the department of transportation treat you in terms of implementation of the Surface Transportation Act? Are you treated as a separate independent political entity? Though you are not a State, are you treated as a State?

Mr. JONES. Yes, we are. There is a division office here just like there is in all the other States.

Mr. MITCHELL. I think they could go around you to the Federal authorities when you are treated just like Virginia under this law.

Mr. JONES. It has something to do with the proximity and the distance of the local government here. Everybody is here in one location.

Mr. MITCHELL. What happened in 1983?

Mr. JONES. In 1983——

Mr. MITCHELL. Why did you take so long to get the money out?

Mr. JONES. Why? Maybe I don't understand the question.

Mr. MITCHELL. In 1983, you got a total of $63 million under the Surface Transportation Act, is that right?

Mr. **Jones**. Yes.

Mr. **Mitchell**. Was all of that spent out?

Mr. **Jones**. Not all of it.

Mr. **Mitchell**. That is what I am trying to get to.

Mr. **Jones**. This is multiyear funding for some large projects and we had the Key Bridge situation. Money was put in this pot, the $103 million. Key Bridge is expected to be about $45 million, and we've got the signal contract which is $35 to $50 million. But we still ended up in the dollars awarded about 57 percent going to minorities.

Mr. **Mitchell**. That $9.4 million in 1983 with 57 percent was actually dollars?

Mr. **Jones**. Yes, not commitments. In 1984 it was 55 percent.

Mr. **Mitchell**. I don't think I have any other questions. You have a very unique situation. You have a majority black population and a substantial number of black businesses of long and varied experience, and I wouldn't think there would be many major problems in the District of Columbia implementing the Surface Transportation Act. The only thing that I do have some concern about and that is a policy question. Some States have taken the position that we don't have that kind of contracting in our State. Therefore we don't have that type of business or whatever is needed to get our States in the minorities. Therefore, because it is not in our State we want to exempt ourselves from that. I think the Department of Transportation federally has been pretty good in saying you look elsewhere if you can't find it within the confines of your State. Mobility is essential to the American business scheme.

Do you have contracts being implemented by minorities who are located other than in DC?

Mr. **Jones**. Yes, we do, and we are trying to train some of the contractors that are working here to get into some areas like steel erection, et cetera. So we can export that skill to Maryland and Virginia.

[Mr. Jones' prepared statement follows:]

PREPARED STATEMENT OF HORACE JONES, ADMINISTRATOR, DESIGN, ENGINEERING AND CONSTRUCTION ADMINISTRATION, DEPARTMENT OF PUBLIC WORKS, DISTRICT OF COLUMBIA

WE ARE GLAD TO RESPOND TO YOUR INVITATION TO PARTICIPATE IN THE COMMITTEE'S HEARINGS ON IMPLEMENTATION OF THE MINORITY ASSISTANCE PROVISIONS OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982. THIS ACT OPERATES IN TANDEM WITH THE DISTRICT OF COLUMBIA MINORITY CONTRACTING ACT OF 1976, AS AMENDED, TO PROVIDE INCREASED OPPORTUNITIES FOR MINORITY, DISADVANTAGED, AND FEMALE BUSINESS ENTERPRISES.

THE DISTRICT'S OWN LAW GOVERNING THE CERTIFICATION OF MINORITY BUSINESS ENTERPRISES WAS PROMULGAGED IN 1976 AND AMENDED IN 1980. THE MINORITY CONTRACTING ACT REQUIRES MINORITY PARTICIPATION IN THE DISTRICT'S PROCUREMENT OPPORTUNITIES IN MUCH THE SAME MANNER AS THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982. FOR THIS REASON, THE DISTRICT HAS A CLEAR ADVANTAGE OVER THOSE JURISDICTIONS WHICH ARE IMPLEMENTING MINORITY/DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS FOR THE FIRST TIME WITH THE ADVENT OF THE SURFACE TRANSPORTATION ASSISTANCE ACT.

THE DISTRICT HAS DRAWN ON THE EXPERIENCE GAINED THROUGH IMPLEMENTATION OF ITS OWN LOCAL LAW TO FURTHER ENHANCE OPPORTUNITIES TO DISADVANTAGED FIRMS UNDER STAA.
OUR INVESTIGATION OF FIRMS REQUESTING DBE/WBE CERTIFICATION AND THE CERTIFICATION ITSELF IS SIMILAR TO THE DISTRICTS' MINORITY BUSINESS OPPORTUNITY COMMISSION. THE GOAL OF 35% PARTICIPATION IS ALSO COMMON TO BOTH PROGRAMS. THE

"SHELTERED MARKET" CONCEPT OF RESERVING SPECIFIC PROJECTS FOR "MINORITY/DISADVANTAGED BIDDERS ONLY" IS ALSO COMMON TO BOTH PROGRAMS.

THE DISTRICT OF COLUMBIA IS PROUD OF ITS RECORD IN THE AREA OF MINORITY PARTICIPATION. THE 1982 MINORITY BUSINESS OPPORTUNITY ANNUAL REPORT REFLECTED THAT THE PERCENTAGE OF DEPARTMENT OF TRANSPORTATION (NOW DEPARTMENT OF PUBLIC WORKS) CONSTRUCTION CONTRACTS AWARDED TO MINORITY FIRMS WAS 71% FOR THE PERIOD OF OCTOBER 1,1981 THROUGH SEPTEMBER 30, 1982, PRIOR TO IMPLEMENTATION OF STAA.

I. OUR DEPARTMENT OF PUBLIC WORKS, IN ITS IMPLEMENTATION OF THE SURFACE TRANSPORTATION ASSISTANCE ACT, HAS MANDATED THAT 35% OF ITS TOTAL DOLLARS BE AWARDED TO DISADVANTAGED BUSINESS ENTERPRISES AND 2% TO FEMALE OWNED BUSINESS FIRMS. DISTRICT REGULATIONS EXCEED FEDERAL LAW IN BOTH GOAL ATTAINMENT AND ITS APPLICATION TO ALL CONTRACTS, REGARDLESS OF THE EXISTENCE OR LEVEL OF FEDERAL FUNDING PARTICIPATION. EXTREME CARE IS EXERCISED TO ENSURE THAT PROGRAM ABUSE DOES NOT EXIST IN THE DEPARTMENT'S DBE PROGRAM AND THAT THE BENEFITS OF THE PROGRAM ACCRUE ONLY TO LEGITIMATE DISADVANTAGED BUSINESS ENTERPRISES AND WOMEN OWNED FIRMS. THE DISTRICT'S CERTIFICATION PROCESS CONSISTS OF THREE COMPONENTS:

(1) THE DISTRICT REQUIRES THE COMPLETION AND SUBMISSION OF A DISCLOSURE AFFIDAVIT BY FIRMS REQUESTING CERTIFICATION. THE FORM IS COMPREHENSIVE IN THAT IT ADDRESSES NOT ONLY OWNERSHIP CRITERIA BUT

MANAGEMENT AND CONTROL CRITERIA AS WELL.

IN ADDITION TO THE 35 QUESTIONS TO BE ANSWERED BY THE FIRM, THE CORPORATION OR PARTNERSHIP IS REQUIRED TO SUBMIT A DISCLOSURE AFFIDAVIT, AND ALMOST A DOZEN OTHER DOCUMENTS THAT HELP US ASSURE AN APPLICANT'S INTENTIONS AND BACKGROUND ARE ACCEPTABLE. THEY ARE LISTED IN MY SUBMITTED TESTIMONY.

(2) THE COMPLETED AFFIDAVIT AND SUPPORTING DOCUMENTATION IS SUBMITTED TO THE DISTRICT'S CONTRACT COMPLIANCE DIVISION WHERE CONTRACT COMPLIANCE SPECIALISTS REVIEW THE INFORMATION FOR COMPLETENESS AND ACCURACY. THESE SPECIALISTS CONDUCT AN INVESTIGATION OF THE AUTHENTICITY OF THE INFORMATION RECEIVED. THIS INVESTIGATION INVOLVES A VARIETY OF ACTIVITIES FROM PREVIOUS BUSINESS PRACTICES BY THE APPLICANT TO FINANCIAL RESOURCES OF A COMPANY OR ITS PARTNERS.

(3) WHEN THE INVESTIGATION IS COMPLETED, THE AFFIDAVIT, SUPPORTING DOCUMENTS AND THE FINDINGS OF THE INVESTIGATION BY DISTRICT STAFF ARE FORWARDED TO THE EVALUATION AND CERTIFICATION COMMITTEE. THE COMMITTEE IS COMPRISED OF SIX INDIVIDUALS REPRESENTING A CROSS SECTION OF THE DISTRICT'S DEPARTMENT OF PUBLIC WORKS WITH EXPERTISE IN BUSINESS MANAGEMENT.

- THESE INDIVIDUALS MEET ON A MONTHLY BASIS AND REVIEW AND EVALUATE THE REQUESTS AND ALL SUPPORTING DOCUMENTATION.
- THE COMMITTEE MAKES A DETERMINATION OF THE ELIGIBILITY OF EACH FIRM. IF A FIRM IS

CERTIFIED, IT IS NOTIFIED IN WRITING OF THE CERTIFICATION, THE AREA CERTIFIED TO PERFORM CONTRACTS, AND THE LENGTH OF CERTIFICATION. THE CERTIFICATION LASTS ONE YEAR UNLESS THE OWNERSHIP, CONTROL AND MANAGEMENT STRUCTURE OF THE FIRM CHANGES WITHIN THIS PERIOD.

- DISTRICT STAFF PERFORMS A BRIEF FOLLOW-UP INVESTIGATION AT THE END OF SIX MONTHS TO DETERMINE IF THERE HAVE BEEN SUBSTANTIAL CHANGES IN THE STRUCTURE OF THE FIRM THAT AFFECT ITS DBE/WBE CERTIFICATION.
- ALSO, EACH FIRM WHICH IS DETERMINED TO BE INELIGIBLE TO PARTICIPATE, IS NOTIFIED IN WRITING WITH AN EXPLANATION OF THIS DENIAL.

II. THE DISTRICT OF COLUMBIA'S PROCEDURES TO ENSURE COMPLIANCE WITH SECTION 105(F) REGARDING DBE PARTICIPATION.

(1) THE DISTRICT HAS INCORPORATED IN THE BID SPECIFICATIONS PACKAGE AND PROCESS, THE APPROPRIATE LEGAL REQUIREMENTS THAT DISADVANTAGED BUSINESS ENTERPRISES AND WOMEN BUSINESS ENTERPRISES PARTICIPATE IN THE CONTRACT TO THE EXTENT THAT AT A MINIMUM THE 35% AND 2% GOALS ARE ACHIEVED. THE BID SPECIFICATIONS DELINEATE TERMS OF THE ELIGIBILITY CRITERIA, THE LEVEL OF PARTICIPATION OF DBES AND WBES, AND PENALTY FOR NON COMPLIANCE WITH THE REQUIREMENT. EACH PROJECT IS REVIEWED IN THE DESIGN STAGE TO DETERMINE THAT DBE/WBE FIRMS ACTUALLY EXIST WHICH CAN PERFORM SUBCONTRACTS BEFORE THE SPECIFICATION PROCESS IS COMPLETED. IT IS RARE THAT SUFFICIENT DBE/WBES DO NOT EXIST WHICH CAN PERFORM ENOUGH OF

THE SUBCONTRACT, THUS REQUIRING A WAIVER OF THE DISADVANTAGED PROVISION. CONSEQUENTLY, MOST OF THE DISTRICT'S SPECIFICATIONS CONTAIN THIS PROVISION.

(2) THE DISTRICT UTILIZES A "SHELTERED MARKET" APPROACH IN ITS PROCUREMENT PROCESS. IF WITHIN THE DESIGN PHASE, AT LEAST THREE QUALIFIED DBE/WBE FIRMS ARE IDENTIFIED WHICH CAN PERFORM THE CONTRACT, THEN THE PROJECT CAN BE SHELTERED FOR "DBE BIDDERS ONLY". THEREFORE, THROUGH THE SUBCONTRACT PROVISIONS OF THE "OPEN MARKET" APPROACH AND THE "SHELTERED MARKET" PROCUREMENT PROCESS, THE DISTRICT IS ASSURED OF ACHIEVING ITS DBE/WBE GOALS.

III. TO DATE, THE DISTRICT HAS NOT FULLY COMPUTERIZED ITS MANAGEMENT INFORMATION SYSTEM TO EFFECT THE IMMEDIATE RETRIEVAL OF ALL DATA RELATIVE TO DBES. THE DISTRICT UTILIZES THE DIRECTORY OF THE SMALL BUSINESS ADMINISTRATION'S 8(A) PROGRAM AND ITS OWN MBOC DIRECTORY FOR INFORMATION ON THE EXISTENCE OF DBES AND WBES. THE DISTRICT'S TOTAL ALLOCATION UNDER THE SURFACE TRANSPORTATION ASSISTANCE ACT IS COMPUTERIZED AND THIS INFORMATION IS READILY AVAILABLE. HOWEVER, DATA RELATIVE TO DBE/WBE SUBCONTRACTOR PARTICIPATION IS NOT COMPUTERIZED AND HAS TO BE COMPILED FROM VARIOUS SOURCES.

IV. THERE ARE SOME PROBLEM AREAS WHICH SHOULD BE POINTED OUT. THERE HAS BEEN RESISTANCE ON THE PART OF NON-DBE PRIME CONTRACTORS TO SUBCONTRACT PORTIONS OF PROJECTS TO DBE/WBES, PARTICULARLY WHEN THE PRIME CONTRACTOR POSSESSES THE CAPABILITY TO PERFORM THE WORK ITSELF.

PRIME CONTRACTORS ATTEMPT TO CIRCUMVENT THE LETTER AND SPIRIT OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 BY CLAIMING A "GOOD FAITH EFFORT", WHILE NOT NEGOTIATING IN GOOD FAITH WITH THE LIST OF DBE/WBES REFERRED BY THE DISTRICT FOR THEIR CONSIDERATION. DISTRICT STAFF HAVE BECOME CONVERSANT IN THE METHODS UTILIZED BY INSINCERE PRIME CONTRACTORS AND ARE ADDRESSING THESE ACTIVITIES THROUGH THE CONTINUED REFINEMENT OF BID SPECIFICATIONS. WHERE IT IS DETERMINED THAT PRIME CONTRACTORS ARE ATTEMPTING TO CIRCUMVENT THE DBE LAW, THE DISTRICT RESERVES THE RIGHT TO DECLARE THEIR BID NON-RESPONSIVE.

AN ADDITIONAL CONCERN TO THE DISTRICT IS THE INCLUSION OF FIRMS AS DBES WHO HAVE BEEN CERTIFIED UNDER THE 8(A) PROGRAM OF THE SMALL BUSINESS ADMINISTRATION. THE SMALL BUSINESS ADMINISTRATION HAS NOT REVIEWED AND GRADUATED FIRMS FROM THEIR PROGRAM WHO EXCEED THE ESTABLISHED SIZE STANDARDS. AS A RESULT, THERE ARE FIRMS WHICH ARE PERMITTED TO COMPETE WHICH WE BELIEVE ARE TOO LARGE TO QUALIFY AS DISADVANTAGED. WE ARE HOPING THAT THE PROPOSED CHANGES IN THE SMALL BUSINESS ADMINISTRATION 8(A) LEGISLATION WILL RESOLVE THIS PROBLEM.

V. THE DISTRICT'S TOTAL ALLOCATION UNDER THE SURFACE TRANSPORTATION ASSISTANCE ACT FOR FISCAL YEAR 1983 IS $103,112,000 AND FOR FISCAL YEAR 1984 IS $65,327,000. DUE TO THE LENGTH OF TIME FROM NOTIFICATION OF FUNDING AVAILABILITY TO DESIGN AND CONTRACT AWARD, MUCH OF THE FUNDS ALLOCATED FOR FISCAL YEAR 1983 AND 1984 WERE NOT CONTRACTUALLY

OBLIGATED DURING THOSE TWO YEARS. HOWEVER, DURING THE FISCAL YEAR 1983, OF THE $16,629,810 OF CONTRACT AWARDS, $9,489.475 (57%) WAS SPENT WITH DISADVANTAGED BUSINESS ENTERPRISES. IN FISCAL YEAR 1984, $26,800,040 WAS AWARDED, AND OF THIS AMOUNT, $14,896,800 (55%) WAS CONTRACTED TO DISADVANTAGED BUSINESS ENTERPRISES.

IN CONCLUSION, I WOULD LIKE TO THANK YOU, CONGRESSMAN MITCHELL AND THE OTHER MEMBERS OF THE COMMITTEE, FOR AFFORDING US AN OPPORTUNITY TO PARTICIPATE IN THIS PROCESS. IT IS THROUGH THESE KINDS OF FORUMS THAT THE IMPLEMENTATION OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 CAN BE FULLY REALIZED TO THE BENEFIT OF CONTRACTING AGENCIES AND DBES/WBES.

I WOULD BE HAPPY TO ANSWER ANY QUESTIONS THE COMMITTE MIGHT HAVE.

TESTIMONY
GOVERNMENT OF THE DISTRICT OF COLUMBIA
ON THE
IMPLEMENTATION OF SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982
THE DEPARTMENT OF PUBLIC WORKS

MR. CHAIRMAN:

WE ARE GLAD TO RESPOND TO YOUR INVITATION TO PARTICIPATE IN THE COMMITTEE'S HEARINGS ON IMPLEMENTATION OF THE MINORITY ASSISTANCE PROVISIONS OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982. THIS ACT OPERATES IN TANDEM WITH THE DISTRICT OF COLUMBIA MINORITY CONTRACTING ACT OF 1976, AS AMENDED, TO PROVIDE INCREASED OPPORTUNITIES FOR MINORITY, DISADVANTAGED, AND FEMALE BUSINESS ENTERPRISES.

THE DISTRICT'S OWN LAW GOVERNING THE CERTIFICATION OF MINORITY BUSINESS ENTERPRISES WAS PROMULGATED IN 1976 AND AMENDED IN 1980. THE MINORITY CONTRACTING ACT REQUIRES MINORITY PARTICIPATION IN THE DISTRICT'S PROCUREMENT OPPORTUNITIES IN MUCH THE SAME MANNER AS THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982. FOR THIS REASON, THE DISTRICT HAS A CLEAR ADVANTAGE OVER THOSE JURISDICTIONS WHICH ARE IMPLEMENTING MINORITY/DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS FOR THE FIRST TIME WITH THE ADVENT OF THE SURFACE TRANSPORTATION ASSISTANCE ACT.

THE DISTRICT HAS DRAWN ON THE EXPERIENCE GAINED THROUGH

IMPLEMENTATION OF ITS OWN LOCAL LAW TO FURTHER ENHANCE OPPORTUNITIES TO DISADVANTAGED FIRMS UNDER STAA.
OUR INVESTIGATION OF FIRMS REQUESTING DBE/WBE CERTIFICATION AND THE CERTIFICATION ITSELF IS SIMILAR TO THE DISTRICTS' MINORITY BUSINESS OPPORTUNITY COMMISSION. THE GOAL OF 35% PARTICIPATION IS ALSO COMMON TO BOTH PROGRAMS. THE "SHELTERED MARKET" CONCEPT OF RESERVING SPECIFIC PROJECTS FOR "MINORITY/DISADVANTAGED BIDDERS ONLY" IS ALSO COMMON TO BOTH PROGRAMS.

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IN CONCLUSION, I WOULD LIKE TO THANK YOU, CONGRESSMAN MITCHELL AND THE OTHER MEMBERS OF THE COMMITTEE, FOR AFFORDING US AN OPPORTUNITY TO PARTICIPATE IN THIS PROCESS. IT IS THROUGH THESE KINDS OF FORUMS THAT THE IMPLEMENTATION OF THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 CAN BE FULLY REALIZED TO THE BENEFIT OF CONTRACTING AGENCIES AND DBES/WBES.

I WOULD BE HAPPY TO ANSWER ANY QUESTIONS THE COMMITTE MIGHT HAVE.

FOR A CORPORATION

A. LAST THREE YEAR'S FINANCIAL STATEMENT PREPARED BY AN INDEPENDENT CPA OR ACCOUNTANT.

B. RESUMES OF PRINCIPALS OF YOUR COMPANY SHOWING EDUCATION, TRAINING AND EMPLOYMENT WITH DATES.

C. LICENSE TO DO BUSINESS IN THE DISTRICT OF COLUMBIA AND ANY OTHER NECESSARY LICENSES.

D. ARTICLES OF INCORPORATION, INCLUDING DATE APPROVED BY STATE, AND ANY SUBSEQUENT AMENDMENTS.

E. MINUTES OF FIRST CORPORATE ORGANIZATIONAL MEETING.

F. CORPORATION BY-LAWS.

G. COPY OF STOCK CERTIFICATE(S) ISSUED (NOT A SPECIMEN COPY).

H. STOCK LEDGER.

I. PROOF OF STOCK PURCHASE.

J. COPIES OF THIRD PARTY AGREEMENTS SUCH AS RENTAL OR MANAGEMENT SERVICE AGREEMENTS, ETC.

K. IF OTHER THAN FEMALE OR BLACK, PROOF OF MINORITY STATUS.

THIS INFORMATION IS REQUIRED OF BOTH FIRMS WHO WILL BE PERFORMING AS A JOINT VENTURE.

FOR A PARTNERSHIP

A. LAST THREE YEAR'S FINANCIAL STATEMENTS PREPARED BY AN INDEPENDENT CPA OR ACCOUNTANT.

B. RESUMES OF ALL PARTNERS SHOWING EDUCATION, TRAINING AND EMPLOYMENT WITH DATES.

C. LICENSE TO DO BUSINESS WITH THE DISTRICT OF COLUMBIA.

D. Partnership agreement.

E. Buy out rights agreement.

F. Profit sharing agreement.

G. Proof of capital invested.

H. If other than Female or Black, proof of minority status.

In addition, for both corporations and partnerships, submit all agreements relating to:

A. Stock options.

B. Ownership options.

C. Stockholders agreements.

D. Buy-out rights.

E. Stockholders voting rights.

F. Restrictions on the disposal of stock loan agreements.

G. Facts pertaining to the value of shares.

H. Ownership of voting securities.

Mr. MITCHELL. Thank you very much. You have been very patient. This hearing has been very beneficial, but it is not the end. We don't really make our full evaluation of this until we hear from the black businessmen of Los Angeles and the Black United Contractors of Illinois. We've got to match their testimony alongside that which we have heard here. By the time we do that we will have a pretty good picture of whether or not this law is being implemented.

I thank all of you for your participation. It has been a long day, but it has been a fruitful one for me. I am very grateful to you. Thank you. The hearing is now concluded.

[Whereupon, the subcommittee adjourned, to reconvene subject to call of the Chair.]

APPENDIX

APPENDIX A.—NEW YORK STATE ETHNIC BREAKDOWN OF RECIPIENTS OF CONTRACTS AWARDED, 1983–84

Reporting period	Contracts awarded construction and consultants		Dollar value construction and consultants		No. black American contracts		Dollar value contracts		Percent black American of total	
	Federal	State	Federal	State	Federal	State	Black Federal	State	Federal	State
Oct. 1 to Oct. 20, 1983	24	11	19,984,125	4,169,646	7	2	1,521,842	43,618	7.6	1.0
Oct. 21 to Nov. 20, 1983	30	7	67,544,010	6,826,185	7	1	1,358,148	14,500	2.0	.2
Nov. 21 to Dec. 20, 1983	57	13	76,947,980	3,617,548	23	2	2,546,275	138,937	3.3	3.8
Oct. 21, 1983 to Jan. 20, 1984	30	12	62,387,505	6,101,427	5	1	829,768	520,395	1.3	8.5
Jan. 21 to Feb. 20, 1984	43	10	34,960,071	2,598,769	6		571,706		1.6	
Feb. 21 to Mar. 20, 1984	27	23	18,050,499	5,874,925	14	1	5,528,985	4,000	30.6	.01
Mar. 21 to Apr. 21, 1984	43	41	29,912,475	30,580,184	11	6	2,111,175	427,300	7.1	1.4
Apr. 21 to May 20, 1984	40	36	61,241,175	19,236,414	14	14	3,016,835	1,034,900	4.9	5.4
May 21 to June 20, 1984	32	30	54,144,217	23,396,504	12	8	2,565,882	2,439,383	4.7	10.4
June 21 to July 20, 1984	50	26	46,092,857	11,193,485	22	2	4,155,198	188,141	9.0	1.7
July 21 to Aug. 20, 1984	41	38	25,473,114	18,010,262	15	8	1,614,960	1,445,143	6.3	8.0
Total	417	247	496,738,028	131,605,349	136	45	28,821,074	6,256,317	5.8	4.7

Reporting period	Contracts awarded construction and consultants		Dollar value construction and consultants		No. Asian-Indian American contracts		Dollar value contracts		Percent Asian-Indian American of total	
	Federal	State	Federal	State	Federal	State	Black Federal	State	Federal	State
Oct. 1 to Oct 20, 1983	24	11	19,984,125	4,169,646	4	—	430,426		2.1	
Oct. 21 to Nov. 20, 1983	30	7	67,544,010	6,826,185	1	—	462,155		.6	
Nov. 21 to Dec. 20, 1983	57	13	76,947,980	3,617,548	10	1	801,060	114,075	1.0	3.1
Dec. 21, 1983 to Feb. 20, 1984	30	12	62,387,505	6,101,427	5	—	1,009,287		1.6	
Jan. 21 to Feb. 20, 1984	43	10	34,960,071	2,598,769	4	1	261,833	121,839	.7	4.7
Feb. 21 to Mar. 20, 1984	27	23	18,050,499	5,874,925	5	—	488,849		2.7	
Mar. 21 to Apr. 20, 1984	43	41	29,912,475	30,580,184	3	1	329,130	4,060	1.1	.01

Reporting period	Contracts awarded construction and consultants		Dollar value construction and consultants		No. Asian-Indian American contracts		Dollar value contracts		Percent Asian-Indian American of total	
	Federal	State	Federal	State	Federal	State	Black Federal	State	Federal	State
Apr. 21 to May 20, 1984	40	36	61,241,175	19,236,414	4	—	247,740			
May 21 to June 20, 1984	32	30	54,144,217	23,396,504	4	—	95,755			
June 21 to July 20, 1984	50	26	46,092,857	11,193,485	4	1	299,000	228,587	.5	2.0
July 21 to Aug. 20, 1984	41	38	25,473,114	18,010,262	—	1		82,488	.0	.5
Total	417	247	496,738,028	131,605,349	44	4	4,355,235	551,049	.9	.4

Reporting period	Contracts awarded construction and consultants		Dollar value construction and consultants		No. Native American contracts		Dollar value contracts		No. percent Native American of total	
	Federal	State	Federal	State	Federal	State	Federal	State	Federal	State
Oct. 1 to Oct. 20, 1983	24	11	19,984,125	4,169,646	2	1	145,779	86,400	0.7	2.1
Oct. 21 to Oct. 20, 1883	30	7	67,544,010	6,826,185	2	—	540,468		.8	
Nov. 21 to Dec. 20, 1983	57	13	76,947,980	3,617,548	4	1	134,358	17,212	.2	.5
Dec. 21, 1983 to Jan. 20, 1984	30	12	62,387,505	6,101,427	2	—	2,800		.0	.0
Jan. 21 to Feb. 20, 1984	43	10	34,960,071	2,598,769	5	—	672,700		1.9	
Feb. 21 to Mar. 20, 1984	27	23	18,050,499	5,874,925	10	—	1,444,516		8.0	
Mar. 21 to Apr. 20, 1984	43	41	29,912,475	30,580,184	4	—	815,275		2.7	
Apr. 21 to May 20, 1984	40	36	61,241,175	19,236,414	6	2	151,590	548,895	.2	2.9
May 21 to June 20, 1984	32	30	54,144,217	23,396,504	5	2	171,979	53,553	.3	.2
June 21 to July 20, 1984	50	26	46,092,857	11,193,485	6	3	224,388	31984,497	.5	3.4
July 21 to Aug. 20, 191984	41	38	25,473,114	18,010,262	4	2	303,375	101,049	1.2	.4
Total	417	247	496,738,028	131,605,349	50	11	4,607,228	1,191,606	.9	.9

Reporting period	Contracts awarded construction and consultants		Dollar value construction and consultants		No. WBE Caucasian American contracts		Dollar value contracts		Percent WBE Caucasian American of total	
	Federal	State	Federal	State	Federal	State	Federal	State	Federal	State
Oct. 1 to Oct. 20 1983	24	11	19,984,125	4,169,646	7	7	738,332	418,965	3.6	10.0
Oct. 21 to Nov. 20, 1983	30	7	67,544,010	6,826,185	8	2	153,500	18,105	.2	.2
Nov. 21 to Dec. 20, 1983	57	13	76,947,980	3,617.548	20	6	584,588	144,020	.8	3.9
Dec. 21 1983 to Jan. 20, 1984	30	12	62,387,505	6,101,427	10	2	767,319	175,184	1.2	2.9
Jan. 21 to Feb. 20, 1984	43	10	34,960,071	2,598,769	14	7	820,025	357,300	2.3	13.7
Feb. 21 to Mar. 20, 1984	27	23	18,050,499	5,874,925	25	1	1,508,149	10,500	8.3	.17
Mar. 21 to Apr. 21, 1984	43	41	29,912,475	30,580,184	26	8	2,885,961	150,625	9.6	.5
Apr. 21 to May 20, 1984	40	36	61,241,175	19,236,414	20	22	576,391	1,028,818	.9	5.3
May 21 to June 20, 1984	32	30	54,144,217	23,396,504	23	20	856,824	427,250	1.5	1.8
June 21 to July 20, 1984	50	26	46,092,857	11,193,485	21	15	1,061,694	1,006,217	2.3	9.0
July 21 to Aug. 20, 1984	41	38	25,473,114	18,010,262	23	10	2,808,387	331,885	11.0	1.8
Total	417	247	496,738,028	131,605,349	197	100	12,770,170	4,068,869	2.6	3.1

Reporting period	Contracts awarded construction and consultants		Dollar value construction and consultants		No. Hispanic American contracts		Dollar value contracts		Percent Hispanic American of total	
	Federal	State	Federal	State	Federal	State	Federal	State	Federal	State
Oct. 1 to Oct. 20, 1983	24	11	19,984,125	4,169,646	9	4	530,074	217,525	2.6	5.2
Oct. 21 to Nov. 20, 1983	30	7	67,544,010	6,826,185	8	4	418,831	2,344,656	.6	34.3
Nov. 21 to Dec. 20, 1983	57	13	76,947,980	3,617,548	11	6	606,565	373,402	.8	10.3
Dec. 21, 1983 to Jan. 20, 1984	30	12	62,387,505	6,101,427	5	1	3,217,884	38,790	5.2	.6
Jan. 21 to Feb. 20, 1984	43	10	34,960,071	2,598,769	11	4	2,284,086	634,267	6.5	24.4
Feb. 21 to Mar. 20, 1984	27	23	18,050,499	5,874,925	5	1	2,723,353	93,682	15.1	1.6
Mar. 21 to Apr. 20, 1984	43	41	29,912,475	30,580,184	14	2	1,591,601	464,126	5.3	1.5
Apr. 21 to May 20, 1984	40	36	61,241,175	19,236,414	10	8	2,669,069	973,453	4.3	5.1
May 21 to June 20, 1984	32	30	54,144,217	23,396,504	11	7	753,156	537,565	1.4	2.3
June 21 to July 20, 1984	50	26	46,092,857	11,193,485	9	....	1,326,089	466,278	2.9	4.2
July 21 to Aug. 20, 1984	41	38	25,473,114	18,010,262	5	3	217,910	124,944	.8	.7
Total	417	247	496,738,028	131,605,349	108	....	16,338,618	6,268,688	3.3	4.7

APPENDIX B.—QUESTIONS SUBMITTED BY HON. RON WYDEN, AND D.O.T.'S REPLIES

HOPSING ACTIONS

Question. Are you familiar with the case I described in my opening statement? If yes, can you tell me specifically why DOT decided not to pursue actions against the companies involved?

Answer. We are familiar with the case in question, in which the Department found that the Hopsing Construction Company was not an eligible disadvantged business enterprise (DBE). The Department examined three possible additional courses of action against the Hopsing firm and the R.A. Hatch Construction Company, a prime contractor with which Hopsing is closely associated.

We considered an action under the False Statements provision of Title 18, United States Code. In order to refer a case of this kind to the Department of Justice for criminal prosecution, the Department must have reasonable grounds to believe that a firm or individual has knowingly and willfully made a false statement in connection with a DOT-assisted contract. The mere assertion that one's firm is an eligible DBE does not, by itself, constitute a sufficient basis for a false statements prosecution in most cases, even when the Department's Office of Civil Rights later determines that the firm is not eligible.

In this case, the only item that the Inspector General noted that could conceivably be regarded as a false statement was an erroneous list of the owners of the Hopsing firm provided to the Oregon Department of Transportation (ODOT) on a certification form. However, Hopsing had, some months previously, provided the correct list of its owners to ODOT. In these circumstances, it would be difficult to conclude that Hopsing demonstrated, beyond a reasonable doubt, any criminal intent with respect to the ownership information it provided to ODOT.

In the absence of a criminal violation, action under the Department's suspension and debarment regulations may be maintained if the Department can show that a firm demonstrated a serious lack of business integrity. Under the suspension and debarment regulations, it is the responsibility of the DOT operating administration in whose program the alleged violation occurs to determine whether to institute a suspension or debarment action. In this case, the Federal Highway Administration considered the case and made the judgment that there was insufficient evidence of a serious lack of business integrity on the part of the firms involved to make likely a successful suspension or debarment action. Again, the fact that a firm is not eligible to participate in DOT programs as a DBE does not necessarily mean that the firm's conduct warrants its suspension and debarment.

The Department's Office of General Counsel considered the question of whether the Department had the authority to direct ODOT to direct the prime contractor to terminate Hopsing's subcontracts on the ground that it had been decertified as a DBE after it received the contracts and require the substitution of an eligible DBE. The Department's DBE regulations do not assert this authority on behalf of the Department. In the absence of any regulatory provision giving the Department this authority, or any language in ODOT's solicitations or prime contracts making continued eligibility as a DBE a condition of being able to continue performing a contract that has already been awarded, we do not believe that the Department is authorized to require the termination of a contractual relationship between two private businesses in these circumstances. However, ODOT is still responsible for meeting the approved DBE participation goal if an ineligible firm does work that was originally counted in setting the goal.

DEBARMENT/CRIMINAL PROCEEDINGS

Questions. Under what circumstances would DOT pursue debarment proceedings or civil or criminal actions against a company determined to have violated the intent of the DBE previsions?

Answer. The Department would refer a case to the Department of Justice for possible criminal prosecution if we had reasonable grounds to believe that the firm had knowingly and willfully made a false statement or otherwise violated Federal fraud, mail fraud, or other criminal statutes. Regardless of criminal prosecution, the Department would proceed with suspension and debarment proceedings against any company which, based on the evidence in the case, had demonstrated a serious lack of business integrity concerning its participation in the DBE program. At the present time, for example, the Federal Highway Administration is considering the cases of four companies whose conduct may warrant such action.

DBE DEBARMENTS AND CIVIL OR CRIMINAL ACTIONS

Question. Has a company determined to have violated the intent of the DBE provisions ever been debarred or been subject to civil or criminal penalties pursued by either the Justice Department or DOT? If yes, what were the circumstances surrounding the situation?

Answer. While the Department has referred a number of cases of potential criminal conduct in the DBE program to the Department of Justice or U.S. attorneys for possible prosecution, no prosecution has taken place. We are continuing to work with the Department of Justice to identify appropriate cases for criminal prosecution. There have not yet been any suspension or debarment proceedings brought, in DBE Cases, under the Department's new suspension and debarment rule, which became effective in May of this year. However, FHWA is currently considering initiating such proceedings in four cases. In addition, we are preparing a draft amendment to our DBE regulation to specifically reference the applicability of the suspension and debarment rule to the DBE program.

FAIRNESS OF CONTINUING CONTRACT WITH NON-DBE

Question 4. Say a company is found to have violated the intent of the DBE provisions, do you think it is fair for that company to continue to work on projects that were previously awarded because the company was thought to be a disadvantaged business?

Answer. A finding that a firm is determined to be ineligible on a DBE can result from a change in the firm's circumstances, a misunderstanding of eligibility requirements, or a good-faith difference in judgment among the firm, a report, and DOT about the ownership, control, or independence of the firm. In these instances, it would not necessarily be unfair for the firm to be permitted to complete contracts it has been awarded and begun performing. On the other hand, if the firm is decertified after having made what can be accurately considered a deliberate attempt to benefit from the program through deceit, it would seem unfair to permit the firm to continue work on the contracts. (This judgment about fairness does not answer the question of whether DOT has the legal authority to require the termination of such a contract, however.)

PRACTICALITY OF REMOVING NON-DBE

Question 5. Is it realistic or possible to remove a construction company from a job it has already started and reward the contract if a violation has been determined?

Answer. This will depend upon the circumstances. If, in a particular case, it was desirable to remove a contractor from a contract and the legal authority to do so existed, the Department would still need to take other factors into account. For example, the costs in money and time might render removal unrealistic. The terminated contractor may well have an action for damages arising from breach of contract, depending on the particular circumstances. The replacement DBE contractor will have legitimate mobilization costs. Readvertisement or resolicitation of the remaining work has its own costs, and the delay involved may be critical to the progress of the project.

INCENTIVES

Question. If the Department is not intent on taking strong actions against companies that try to unjustly benefit from the DBE program, what incentives do these companies have to stop violating the intent or the specific provisions of the program?

Answer. The Department fully intends to take strong, appropriate action against companies whose behavior subjects them to criminal penalties, suspension or debarment. We believe, however, that the goal of deterring misconduct would be ill-served by attempting, unsuccessfully, to invoke these sanctions against companies on the basis of factual evidence of insufficient strength.

APPENDIX C.—INFORMATION SUPPLIED FROM THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF PUBLIC WORKS
DESIGN, ENGINEERING AND CONSTRUCTION ADMINISTRATION
613 G STREET, N.W.
WASHINGTON, D.C. 20001

Contract Compliance Division
Room 636

14 NOV 1984

Mrs. Gloria Bryant
Rayburn House Office Building
Room #2361
Washington, DC 20515

Dear Mrs. Bryant:

The purpose of this communication is to transmit to you the additional information you recently requested regarding the District of Columbia Department of Public Works' participation in the Surface Transportation Assistance Act of 1982. A review of our records reflect the following breakdown of prime and subcontractor awards during fiscal years 1983 and 1984:

Fiscal Year 1983

7 awards to Black DBE primes	$ 1,677,511
8 awards to Hispanic DBE primes	$ 5,829,783
8 awards to Black DBE subcontractors	$ 1,641,609
1 award to Hispanic DBE subcontractor	$ 340,572
Total	$ 9,489,475

Fiscal Year 1984

17 awards to Black DBE primes	$ 3,795,572
10 awards to Hispanic DBE primes	$ 6,144,819
15 awards to Black DBE subcontractors	$ 4,011,910
1 award to Hispanic DBE subcontractor	$ 814,500
Total	$14,766,801

We hope this information will be helpful to you. Please feel free to contact Ms. Betty Cheatham at 727-1293 if additional information is required.

Sincerely,

Horace G. Jones, P.E.
Contracting Officer